TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 613

THE UNITED STATES OF AMERICA, PETITIONER

vs.

GEORGE S. BUSH & CO., INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

PETITION FOR CERTIORARI FILED DECEMBER 29, 1939
CERTIORARI GRANTED FEBRUARY 5, 1940

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1 In United States Court of Customs and Patent Appeals

Customs Appeal Docket No. 4173

GEO. S. BUSH & CO., INC., APPELLANT

vs.

THE UNITED STATES, APPELLEE

Petition for review

Filed May 4, 1938

To the Honorable the United States Court of Customs and Patent Appeals:

Your petitioner, being dissatisfied with the decision and judgment of the United States Customs Court specified below, prays the court to review the questions involved therein, and for such relief as to the court shall seem just.

Decision of March 9, 1938, reappraisement circular 4253, on Seattle reappraisement 113195A/2553, relating to canned clams.

Assignment of errors

As grounds of error in said decision it is asserted that the court below erred:

1. In failing to reappraise said merchandise at the export value as defined in Section 402 (c), tariff act of 1930.
2. In failing to modify or reverse the decision and judgment of the trial court.

2 3. In finding that the proper dutiable value of the involved merchandise was the appraised value.

4. In failing to hold that the Presidential proclamation of May 1, 1934, T. D. 47031, is null and void so far as it relates to the clams other than razor clams, and clams in combination with other substances (except clam chowder), packed in airtight containers.

5. In failing to review the report and findings of the U. S. Tariff Commission on canned clams (report 84) for the purpose of determining whether or not the Commission and the President acted in conformity with the provisions of Section 336, Tariff Act of 1930.

6. In holding that the method of converting foreign currency into U. S. dollars for the purpose of determining the differences in cost of production as referred to in Section 336 is a matter left to the discretion of the Tariff Commission.

7. In failing to hold that the Tariff Commission did not make a legal investigation of the differences in cost of production between the domestic canned clams and foreign canned clams other than razor clams.

San Francisco, April 30, 1938.

GEO. S. BUSH & CO., INC.,
Petitioner.

By LAWRENCE & TUTTLE,
G. R. T.,
Attorneys for Petitioner,
500 Sansome Street, San Francisco.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

Charles F. Lawrence, being duly sworn, deposes and says that he is over the age of 18 years, and that on this day he served the within document upon the Assistant Attorney General, 201 Varick street, New York City, and upon the collector of customs at the port of Seattle, by depositing in a letter box of the U. S.
3 postal service a true copy thereof, in a sealed envelope addressed to each of said officials respectively, and with postage thereon fully prepaid.

CHARLES F. LAWRENCE.

Sworn to before me this 30th day of April, 1938.

S. F. STANLEY.

Designated to Administer Oath under Sec. 486. Tariff Act of 1930.

[File endorsement omitted.]

In United States Customs Court

No. 4173

[Title omitted.]

Return to Court of Customs and Patent Appeals

The petitioner above named, having applied to the United States Court of Customs and Patent Appeals for a review of the questions of law and fact involved in a decision of the United States Customs Court in the above case, and the said Court having ordered this Court to transmit to said Court the record, evidence, exhibits, and samples, together with a certified statement of the facts involved in the case and its decision thereon:

Now, therefore, pursuant to said order, the United States Customs Court does hereby transmit to said Court of Customs and Patent Appeals the record, evidence, exhibits, and samples in said case, together with a certified statement of the facts involved in the case, and also its decision thereon.

This return specifically comprises the following: A copy of

1. Appeal to reappraisement 113195–A.
2. Proceedings before the Court.
3. Exhibit 1 referred to in the proceedings.
4. The decision of the trial court, Reap. Dec. 4034, and judgment.
5. Application for review.
6. Certificate of record.
7. The decision in question, Reap. Dec. 4253, and judgment.

The entry papers and Exs. 2 and 3, referred to in the testimony, will be forwarded later.

Witness the Honorable Presiding Judge of the United States Customs Court, this 25th day of May, A. D. 1938.

[SEAL] J. W. DALE, *Clerk.*

Reap. canned clams.

In United States Customs Court

Appeal to Reappraisement No. 113195–A

Filed April 27, 1936

Seattle, Wash. Filed Apr. 17, 1936. Dep. Col.

Consignee's Appeal to Reappraisement by a Justice of the United States Customs Court

(This appeal must be filed with the Collector of Customs within 10 calendar days from date of notice of appraisement.)

United States Customs Service

District No. 30, Port of Seattle

APRIL 17, 1936.

To the UNITED STATES CUSTOMS COURT,
New York, N. Y.

GENTLEMEN: Pursuant to the provisions of Section 501 of the Tariff Act of 1930, we hereby appeal from the appraisement by the United States Appraiser to a reappraisement by a Judge of the United States Customs Court, upon certain Canned

Claims entered with duress certificate imported by us in the S. S. Pres. Jefferson, entered April 6, 1936. Entry No. C. E. 4670. Collector's Appeal No. —.

Respectfully,

GEO. S. BUSH & CO., INC.,
Appellant,
JOHN P. HAUSMAN,
Pres., Seattle, Washington.

Hearing at Seattle, Wash.

Notify Lawrence & Tuttle, 500 Sansome St., San Francisco, Calif.

[File endorsement omitted.]

In United States Customs Court

Reappraisement 113195–A

GEO. S. BUSH & CO., INC. (Messrs. Geo. A. Jensen & Co.),
PLAINTIFF

vs.

THE UNITED STATES, DEFENDANT

Statement of evidence

SEATTLE, WASHINGTON, *June 26, 1936.*

Before Judge SULLIVAN

Appearances

Lawrence & Tuttle, Esquires, Attorneys for the Plaintiff, by George R. Tuttle, Esquire, of counsel. Joseph R. Jackson, Esquire, Assistant Attorney General, for the Defendant, by Joseph F. Donohue, Esquire, Special Attorney, of counsel.

Colloquy

MR. TUTTLE. This appeal, which is under the Act of 1930, relates to merchandise invoiced—There is 150 cases of 5
6 ounce canned white claims "Geisha Brand" and 150 cases of 8 ounce, presumably the same merchandise. It does not state on the invoice.

It was entered and appraised as stated on the invoice at American selling price. The Plaintiff contends that the proper dutiable value is the export value.

The merchandise of this nature is subject to a—We are not conceding the fact—I am stating it was assessed in accordance with the proclamation of the President, directing that canned clams of certain types be put on the American selling price for dutiable purposes.

The appeal and the point presented by plaintiff is that the Proclamation is void. We do not contest the price the appraiser used of $4.40 and $6.40 per case for similar merchandise on the date of exportation of this merchandise, at the same time we are contending that the—if the American selling price is not the correct dutiable basis, that the export value as shown by the invoice is $2.75 and $3.68 per case, less non-dutiable charges, or a net value of 2.5107 per case and 3.3598 per case is the correct dutiable value.

Judge SULLIVAN. Well, are you going to contend for an export value?

Mr. TUTTLE. Yes, Your Honor.

Judge SULLIVAN. You say it was ordered by Presidential Proclamation to be dutiable under the American selling price?

Mr. TUTTLE. It was.

Judge SULLIVAN. Can you give the T. D. of the Proclamation?

Mr. TUTTLE. I haven't the T. D., but I have a copy of the proclamation, which I intend to offer in evidence.

Judge SULLIVAN. If you have the T. D. number, we can find it very quickly.

Mr. TUTTLE. I should have, but I haven't.

EXAMINER. Here it is, T. D. 47031.

Judge SULLIVAN. That is the Presidential Proclamation?

Mr. TUTTLE. Yes. Does the Government agree or stipulate that the prices on the invoice I just mentioned is the export value of this merchandise, and that the foreign value is not higher?

7 Judge SULLIVAN. He says if the Court finds it has an export value that the price he has just named was the export value.

Mr. DONOHUE. The Government is ready to concede that the prices just stated by counsel are the export prices if the export value is found to be the proper dutiable value, but the prices were given by counsel without adding the dollar sign.

Judge SULLIVAN. That is a proper concession. If the Court finds export value governs, it is conceded the values you have enumerated, the values you named are correct.

Mr. DONOHUE. It is conceded by the Government.

Judge SULLIVAN. It is agreed by both parties there is no foreign value?

Mr. DONOHUE. Yes, Your Honor.

Judge SULLIVAN. Does the United States value supersede the American selling price, but the Proclamation bind—Off the record. (Colloquy here not reported.)

Mr. DONOHUE. Now Mr. Tuttle do you wish to complete the stipulation?

Mr. TUTTLE. Yes.

Mr. DONOHUE. Stipulate that the appraised values are the proper American selling prices and values if the Court finds the proper dutiable value to be the American selling price?

Mr. TUTTLE. That is agreeable.

Judge SULLIVAN. That is agreeable.

Mr. DONOHUE. We will also stipulate the merchandise covered by this controversy, which is the subject matter of T. D. 47031, the Presidential Proclamation.

Mr. TUTTLE. That is agreeable.

Judge SULLIVAN. If that is the case you won't need to offer the Proclamation, because the court can turn to that.

Mr. TUTTLE. I want to offer the report of the United States Tariff Commission, Report No. 84, relating to canned clams, which is addressed to the President of the United States, in a letter of transmittal dated April 25, 1934, and in the same booklet, the proclamations of the President on this report—The report of the Tariff Commission relates to three articles, "canned razor clams; other canned clams; and clam products." I
8 have struck out with pencil those parts of the report which bear on razor clams and other clam products, as neither of those commodities are involved in this present appeal, and I don't want the expense of a large record.

Judge SULLIVAN. Now you are offering that?

Mr. TUTTLE. I offer that in evidence.

Judge SULLIVAN. Any objection?

Mr. DONOHUE. Yes, Your Honor. I think it is sufficient to object at this point on the ground the materiality or relevancy of the exhibit has not been shown.

The Plaintiff has opened his case, and stated only that he is contesting the value returned under the Presidential Proclamation. Now here is a report made by the Tariff Commission to the President. Your Honor is aware this court cannot sit to review the action of the Tariff Commission.

If this document is offered as proof of the facts that it contains, then it is certainly objectionable as not being the best evidence.

Judge SULLIVAN. It is a public document, and the best evidence if it is proper to be admissable, I would not want to keep it out. That is a public document.

Mr. DONOHUE. It is a public document, and it has the same force and effect as any other public document, but it is not merely because it is a public document admissable, because of the facts it contains. I admit of course the existence of T. D. 47031. It is not necessary to offer the report. This is a report to the President by the Tariff Commission containing facts. Its purpose has not been shown, and it is not per se evidential for the facts which it contains.

Judge SULLIVAN. There is only one fact Mr. Donohue that might be admissable along the lines, on the part of the plaintiff, the fact as to whether or not there was a public hearing. We were reversed not so long ago, in an appeal taken by Mr. Bevans, in a case——

Mr. DONOHUE. I recall that.

Judge SULLIVAN. We cannot weigh any fact. They are conclusive as far as we are concerned, but if the question may be raised as to whether or not the proclamation was issued by virtue of public hearings, and that notice was given to those interested in that line of the nature of the commodity under investi-
9 gation, that might be essential to look at that for jurisdictional purposes, but not for the purpose of ascertaining whether or not the facts would justify the conclusion by the Commission. That we cannot enter into at all. But it might be for the purpose of ascertaining whether the President acted within the law when he issued the proclamation.

Mr. DONOHUE. I believe the case to which Your Honor refers is Zeiss vs. The United States. In that case Your Honor will recall testimony was first offered to show that proper notice of hearing was not given, and that dealers in the merchandise affected by the proclamation would not be reasonably informed a hearing was to be held, therefore the documents concerning the report were properly admitted in evidence by this Court. I submit in such event.

Judge SULLIVAN. In the Foster case, possibly not the Foster case, but in the Dutchess Hat case, which Division 1 passed on, I wrote the opinion myself, and I excluded all the reports of the Tariff Commission. While that judgment of the lower court was affirmed, Judge Bland, writing the opinion, held that it would have been proper for the Court to admit the report of the Tariff Commission, to ascertain whether the jurisdictional fact was had to give the President the power to act. For that reason I would not like to keep it out. But do not understand that I am going to pay much attention to any fact stated therein, nor any conclusion the President may have arrived at, as I am speaking now entirely from memory. All I think I can do, would be to ascer-

tain whether or not the President acted within the law in declaring the proclamation. As to the facts, that is foreclosed.

Mr. DONOHUE. If Your Honor will hear me, just once more, I recall as Your Honor does, that the Court held in that series of cases, involving the Presidential proclamation, that these documents were admissible when a jurisdictional fact was questioned. In the case at bar, there certainly has been no showing from which the court may infer he is raising a jurisdictional question, and until that question is raised this report is not admissible.

Judge SULLIVAN. Yes; but he said they were opposing the Presidential Proclamation, and claiming it was void.

Mr. DONOHUE. That may be, because he is challenging the constitutionality of the law, so until he shows just what he is challenging——

Judge SULLIVAN. He can do this in his brief so far as I know. Now he is challenging it on every ground, of course, constitutionally. I don't think he will get very far, but that Zeiss case, rather stinted me a little bit, and I will be a little more careful about keeping out these reports of the Tariff Commission. If that is your ground for objection, I would be inclined to let it in, but I will be guided by the decisions rendered in arriving at whether the President followed the law jurisdictionally.

Mr. DONOHUE. I wish to submit to Your Honor, no foundation has been laid to justify the admission of this document.

Judge SULLIVAN. You don't have to.

Mr. DONOHUE. May I have an exception?

Judge SULLIVAN. Overruled. Let it be marked.

Report referred to marked in evidence Exhibit 1, Reappraisement 113195–A, of this date.

Mr. TUTTLE. We rest.

Mr. DONOHUE. We rest.

Mr. TUTTLE. We submit.

Mr. DONOHUE. We submit.

Mr. TUTTLE. I ask for 60 days for brief, after transcription of the testimony.

Mr. DONOHUE. Sixty days thereafter for the Government to reply.

Mr. TUTTLE. Do you want to put in some samples?

Mr. DONOHUE. Yes.

Judge SULLIVAN. Withdraw the submission.

Mr. DONOHUE. The Government moves in evidence two samples, and I ask they be marked Exhibits 2 and 3, and I ask counsel for the Plaintiff to agree they are samples of the merchandise involved.

Mr. TUTTLE. No objection. We agree to that.

Judge SULLIVAN. All right; they are admitted and will be marked Exhibits 2 and 3.

11 Samples referred to marked in evidence Exhibits 2 and 3, Reappraisement 113195–A, of this date.

Judge SULLIVAN. Let the record show the Plaintiff has been given 60 days to file a brief, and the Government 60 days thereafter. Case submitted.

I do certify that the foregoing transcript is a correct and true transcription of all testimony offered, heard, or introduced by either party on the trial, together with all the objections made, rulings thereon, and exceptions thereto.

F. D. NESBITT.

13 *Exhibit No. 1*

15 United States Tariff Commission

CANNED CLAMS

Report to the President on the differences in costs of production of canned clams in the United States and in the principal competing country, as ascertained pursuant to the provisions of section 336 of title III of the Tariff Act of 1930. With appendix. Proclamation by the President. Report No. 84, second series.

16 United States Tariff Commission

Robert L. O'Brien, Chairman. Thomas Walker Page, Vice Chairman. Edgar B. Brossard, John Lee Coulter, Sidney Morgan. Secretary. Address all communications United States Tariff Commission, Washington, D. C.

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Letter of Transmittal

UNITED STATES TARIFF COMMISSION,
Washington, April 25, 1934.

MY DEAR MR. PRESIDENT: I have the honor to transmit herewith the report of an investigation made by the United States Tariff Commission of differences in costs of production in the United States and in the principal competing countries, for the purposes of section 336 of title III of the Tariff Act of 1930, of

CANNED CLAMS

This report is accompanied by a summary of information obtained by the Commission in the investigation.

A copy of this report was, on April 5, 1934, submitted for consideration by the Executive Committee on Commercial Policy. Assistant Secretary of State Sayre, as chairman of that committee, states, in a letter dated April 19, 1934, that the committee is in accord with this report. Mr. Sayre suggests that the letter of transmittal to you include a statement interpreting in terms of ad valorem duty the change to American selling price as the basis for assessment of the 35-percent ad valorem. In accordance with that suggestion, I report that the approximate rates of duty on foreign value equivalent to 35 percent on American selling price, using prices and values ascertained during the period covered by this investigation, are 113 percent in the case of clams in 10-ounce tins and 98 percent in the case of clams in 15- and 16-ounce tins.

The draft of the proclamation is being submitted through the Director of the Bureau of the Budget, the Attorney General and

the Department of State, in compliance with Executive order of August 10, 1933.

Respectfully,

ROBERT L. O'BRIEN, *Chairman.*

The PRESIDENT,
The White House.

21 CANNED CLAMS

UNITED STATES TARIFF COMMISSION,
Washington, April 5, 1934.

To the PRESIDENT:

The United States Tariff Commission herein reports the results of an investigation of the differences in costs of production of clams packed in airtight containers and herein also designated as canned clams, in the United States and in the principal competing countries, for the purposes of section 336 of title III of the Tariff Act of 1930, and its findings with respect thereto.

Upon consideration of the facts obtained in this investigation the Commission finds that the present rate of duty fixed by the Tariff Act of 1930, paragraph 721 (b), namely, 35 percent ad valorem, should be reduced in the case of canned razor clams (Siliqua patula) to 23 percent ad valorem, and should be increased in the case of other canned clams and of canned clams in combination with other substances (except clam chowder) to 35 percent ad valorem, assessed on the American selling price of the domestic article. The Commission makes no finding with reference to a change in the duty on clam juice or on clam chowder.

The Commission instituted this investigation on June 28, 1932, in response to an application for an increase in the duty on all canned clams and an application for a decrease in the duty on minced razor clams. Public notice of the hearing was given on the same date. At the public hearing, held on October 5, 1932, in Washington, D. C., parties interested were given reasonable opportunity to be present, to produce evidence, and to be heard, as required by law.

The products covered by paragraph 721 (b) fall, from the standpoint of the competition of imports with domestic production, into three groups as follows:

(1) Canned razor clams.—These are a distinct species produced commercially only on the Pacific coast of the United States and Canada and they command a higher price than other canned clams or clam products.

(2) Other canned clams (put up without admixture with other substances).

(3) Clam juice, and clams or clam juice in combination with other substances.—The most important of these products is clam chowder. There is a large production of clam chowder on the Atlantic coast of the United States; there is practically no importation. Canada is probably the only other country in which canned clam chowder, similar to the domestic product, is produced commercially. By reason of the difficulty of establishing comparability between domestic and foreign clam chowder,
22 and the difficulty of estimating the value of brand reputation, which is a major factor in this trade, the Commission did not investigate the cost of production of clam chowder. Its findings with respect to the duty on "other canned clams" are, however, extended to cover clams in combination with other substances, except clam chowder, in order to prevent evasion of the higher duty on this product by the inclusion therewith of small quantities of other substances. The investigation did not include canned clam juice, which is a by-product of the clam packing industry, and of which there are no imports

FINDINGS OF THE COMMISSION

I. RAZOR CLAMS

1. Under the Tariff Act of 1922 all canned clams were free of duty. By the act of 1930 the duty was fixed at 35 percent ad valorem.

2. Razor clams are found only on the North Pacific coast of North America. The canned domestic product is put up in Washington, Oregon, and Alaska, and the imported product in British Columbia. The domestic production from 1922 to 1928 ranged from about 94,000 to about 142,000 standard cases (48 tins of 5 ounces, drained weight, per case), with no distinct upward or downward tendency. The production has since been considerably smaller, namely, 70,000 cases in 1929, 74,000 in 1930, 77,000 in 1931, and 90,000 in 1932.

3. Imports of razor clams were not distinguished in the trade statistics of the United States before 1931. The export trade statistics of Canada, the only country from which there are imports, indicate that for several years preceding the act of 1930 imports into the United States were increasing until they reached a very considerable proportion, apparently about one-fourth of the domestic consumption, but that after 1929 they declined greatly. According to United States statistics, the imports in 1931 were 96,000 pounds; in 1932, 151,000; and in 1933, 41,000 pounds.

4. Canada is the principal competing country.

5. Costs of production in the United States and Canada were ascertained for the years 1931 and 1932, which are a representative period for the purposes of section 336. The Canadian costs were converted to United States dollars at the rates of exchange prevailing during those years, respectively.

6. Canned razor clams imported from Canada are like or similar to those produced in the United States. The bulk of the production and of the imports consist of 7-ounce tins and 10-ounce tins, and the cost differences with respect to these sizes are representative of the cost differences for all canned razor clams.

7. San Francisco is the principal market in the United States for canned razor clams.

8. Cost difference as ascertained in accordance with section 336:

A. Costs of production of canned razor clams were ascertained from representative producers in the United States and from the only important producer in Canada. These costs cannot be published without disclosing the operations of this single producer.

23 B. Costs of transportation of the domestic and the Canadian product from the centers of production to San Francisco were ascertained and are shown in the attached summary of information.

C. No other relevant factors constituting an advantage or disadvantage in competition were disclosed in the course of the investigation.

The domestic cost of production, including transportation and other delivery charges, to the principal market in the United States, exceeded the corresponding cost of the Canadian article, during the 2-year period covered by the investigation, by $1.06 per case for the clams packed in 7-ounce tins and by $1.54 per case for those packed in 10-ounce tins. The average dutiable value of the imports was $4.82 per case for 7-ounce and $6.40 per case for 10-ounce tins. The excess of domestic over Canadian costs was thus equal to 22 percent of the dutiable value for 7-ounce tins and 24 percent for 10-ounce tins; the average of these two percentages, being the rate of duty necessary to equalize the difference in costs, was 23 percent.

II. OTHER CANNED CLAMS

1. As already stated, all canned clams were free under the Tariff Act of 1922 and are dutiable at 35 percent under the act of 1930.

2. The domestic production of canned clams other than razor clams (not including clam chowder, juice, etc.) has varied con-

siderably from year to year, but for 10 years or more prior to 1932 there was no distinct tendency either upward or downward. The total value of the domestic product was $534,000 in 1930, $534,000 in 1931, and $376,000 in 1932. The decrease in value in 1932 was due primarily to reduced quantities produced. The total output of canned clams other than razor clams was 123,000 cases (about 1,961,000 pounds drained weight) in 1931 and 92,000 cases (about 1,416,000 pounds drained weight) in 1932 (these are cases of varying weight of contents, and the decrease in weight was somewhat less than in the number of cases).

3. Competition of imports is almost exclusively with the Pacific coast production in the United States. The total output of canned clams (other than razor clams) on the Pacific coast in 1931 was 10,135 cases (about 189,000 pounds drained weight), valued at $56,000.

4. The imports of canned clams other than razor clams come almost exclusively from Japan and are sold almost exclusively on the Pacific coast. The imports were not shown separately in the United States statistics prior to 1931. Until 1928 at least they were small as compared with total domestic production, and even as compared with production on the Pacific coast. During the years 1931 to 1933, the imports have greatly exceeded the domestic production on the Pacific coast and have been equal to roughly one-third of the total production of all kinds of canned clams (except razor clams) on both coasts of the United States. They amounted to 960,000 pounds in 1931, 1,333,000 pounds in 1932, and 1,376,000 pounds in 1933.

5. Japan is the principal competing country.

24 6. The years 1931 and 1932 are representative with respect to the domestic cost of production of canned clams and the invoice prices of Japanese canned clams, in terms of Japanese currency. During most of 1931 the exchange rate of the Japanese yen for the dollar was not much below par, whereas since that time it has been much below par. For this reason the invoice prices of the Japanese product imported in 1931, when converted to dollars at the then current rate of exchange, are not representative of the present or probable future invoice values in terms of dollars. The Commission has, therefore, used, for comparison with the domestic costs, the invoice prices in yen as evidence of costs of the Japanese product during 1931 and 1932, converted to dollars at the average rate of exchange for 1932. Although the exchange rate of the yen has risen since April 1933, the rate now prevailing is not much higher than the average rate for 1932.

7. The production of canned clams in the United States comprises several species or varieties. The largest production is that of canned soft clams on the Atlantic coast; canned soft clams are not produced in Japan, the principal competing country. The imports from Japan are of species of hard clams known in the trade as "white clams" and "baby clams." These species are not produced commercially in the United States, but they are like or similar in use, quality, and price to the littleneck and butter clams (both being hard clams) canned on the Pacific coast of the United States. The Commission selected samples, representative as regards size of container and method of packing, of the domestic product of these two species put up on the Pacific coast, and samples of the imported product which were like or similar thereto. The cost differences found for these selected samples are representative of the cost differences with respect to all canned clams produced in the United States and in the principal competing country.

8. San Francisco is the principal market in the United States for canned hard clams, both domestic and imported.

9. The cost of production, as defined in section 336 (h) (4), was not readily ascertainable for the principal competing country, and the Commission, in accordance with section 336 (e) (2) (A), accepted as evidence thereof the weighted average invoice prices of imports from that country.

10. Costs of production ascertained in accordance with section 336:

A. The average domestic cost of production of the representative samples of canned clams (other than razor clams) during 1931 and 1932 was, for 10-ounce tins, $4.24 per case, and for 16-ounce tins, $5.84 per case. The average cost as evidenced by invoice prices of the like or similar Japanese samples in the same years, converted to dollars at the average exchange rate of 1932, was $1.58 per case for 10-ounce tins and $2.40 per case for 15-ounce tins (containing substantially the same quantity, drained weight, as the domestic 16-ounce tins).

B. The average cost of transportation and other delivery charges for the representative samples from the centers of domestic production to San Francisco during the representative period was $0.26 per case for 10-ounce tins and $0.42 per case for 16-ounce tins. The corresponding cost for the Japanese product was $0.30 per case for 10-ounce tins and $0.37 per case for 15-ounce tins.

C. No other relevant factors constituting an advantage or disadvantage in competition were disclosed during the course of the investigation.

The total cost of production, including transportation and other delivery charges to San Francisco, was thus, for 10-ounce tins, $4.50 per case for the domestic product, and $1.88 per case for the foreign product, the excess of domestic costs being $2.62 per case; and for the larger tins, $6.26 per case for the domestic and $2.77 per case for the foreign product, the excess of domestic costs being $3.49 per case.

The dutiable value of the Japanese product during 1931 and 1932, converted to dollars at the average rate of exchange for 1932, was $1.71 per case for the 10-ounce tins and $2.52 per case for the 15-ounce tins.

The excess of the domestic over the foreign cost as a percentage of the dutiable value of the foreign product, being the ad valorem rate of duty necessary to equalize the difference in costs, was thus 153 percent for the product packed in 10-ounce tins and 138 percent for the product packed in the larger tins.

11. Since the present rate of duty on canned clams is 35 percent on the foreign dutiable value, the rate of duty on foreign value which would be necessary to equalize the difference in costs exceeds the present rate by more than 50 percent thereof. Section 336 (b) of the Tariff Act of 1930 provides that under such circumstances the Commission shall specify "such ad valorem rates of duty based upon the American selling price (as defined in section 402 (g), of the domestic article, as it finds shown by the investigation to be necessary to equalize such differences." It also provides, however, that the rate when applied on the American selling price shall not exceed the rate fixed by statute for application to the foreign dutiable value, in this case 35 percent. Examination of the American selling prices of the representative samples of domestic canned clams shows that the amount of duty resulting from the application of a rate of 35 percent to the American selling price is less than the excess of domestic over foreign costs.

12. The cost difference above set forth is representative of differences in production costs of clams in combination with other substances. As already stated, no cost comparison was made with respect to clam juice or clam chowder. Clam chowder consists of "clams in combination with other substances." It is undesirable, however, to exclude from the application of the increased duty on canned clams every combination of clams with other substances, for the reason that it might then be possible to evade the increase in duty by including with the clams small quantities of other substances, virtually not changing the character of the article. Clam chowder, on the other hand, is familiar in the trade, and although it is made with a variety of ingredi-

ents it can be distinguished from canned clams to which minor quantities of other ingredients have been added. The Commission finds, therefore, that the duty found with respect to canned clams (other than razor clams) should apply to combinations of clams with other substances, except clam chowder.

26 CONCLUSION

The Commission finds it shown by the investigation—

(a) That the duty of 35 percent ad valorem, expressly fixed by statute on clams, clam juice, or either in combination with other substances, packed in airtight containers, does not in the case of clams and of clams in combination with other substances (except clam chowder), packed in airtight containers, equalize the difference in the costs of production, including transportation and other delivery charges to the principal market in the United States, of the domestic articles and the like or similar foreign articles produced in the principal competing countries;

(b) That in the case of razor clams (Siliqua patula), packed in airtight containers, a decrease of 12 percent ad valorem in the rate of duty is necessary to equalize such difference; and

(c) That with respect to razor clams (Siliqua patula), packed in airtight containers, the rate of duty necessary to equalize said difference is 23 percent ad valorem, and that with respect to other clams and to clams in combination with other substances (except clam chowder), packed in airtight containers, the rate of duty necessary to equalize such difference within the limits permitted by section 336 (b) of title III of the Tariff Act of 1930 is 35 percent ad valorem based upon the American selling price of the domestic article.

The Commission makes no finding with respect to (a) clam juice, (b) clam juice in combination with substances other than clams, or (c) clam chowder, all the above packed in airtight containers.

Appended to this statement of findings is a summary of information obtained in the investigation.

Respectfully submitted.

ROBERT L. O'BRIEN,
Chairman.
THOMAS WALKER PAGE,
Vice Chairman.
EDGAR B. BROSSARD.
JOHN LEE COULTER.
Commissioners.

27. SUMMARY OF INFORMATION OBTAINED IN THE COMMISSION'S INVESTIGATION WITH RESPECT TO CLAMS PACKED IN AIRTIGHT CONTAINERS

RATES OF DUTY

Act	Paragraph	Article	Percent ad valorem
1922	1662	* * * other shellfish, fresh, frozen, packed in ice, or prepared or preserved in any manner, and not specially provided for.	Free
1930	721 (b)	Clams, clam juice, or either in combination with other substances, packed in airtight containers.	35

SCOPE OF THE INVESTIGATION

This inquiry is limited to cooked clams packed in airtight containers. The article is referred to in commerce as "canned clams."

Other clam products provided for in paragraph 721 (b) of the Tariff Act of 1930, are clam chowder, clam juice, clam nectar, clam paste, and clam sauce. There are no imports of clam chowder. Clam paste and clam sauce are not produced in the United States, and clam juice and clam nectar are negligible in both domestic production and imports.

With respect to canned clams, the domestic costs of packing were obtained for Pacific coast razor clams, butter clams, and little neck clams. Foreign costs of production were obtained for Canadian razor clams, and invoice prices as evidence of costs of production were obtained for Japanese white clams and baby clams. Costs of transportation to San Francisco, the principal market of competition, were obtained for both the domestic and imported products.

Costs of Atlantic coast clams were not obtained. From 15 to 25 percent of the Atlantic coast pack is shipped to the Pacific coast but the product consists almost entirely of "soft" clams. Imports consist almost entirely of hard clams from Japan and razor clams from British Columbia which respectively compete mainly with domestic Pacific coast hard clams and razor clams.

The articles have been divided into three classes as follows: (1) razor clams (Siliqua patula), (2) other clams, and (3) clam products (juice, chowder, paste sauce).

This report is given in three parts according to the classifications named above.

28

PART 1. RAZOR CLAMS

DESCRIPTION AND USES

The razor clam (Siliqua patula) is one of numerous species of clams put up in tins. It is distinct in color, size, and flavor, and is marketed under the name razor clam. The canned product consists of clam meat packed in clam juice collected during the canning process. The bulk of the pack consists of minced meat. Only the white meat, free of dark-colored portions is used for canning. The tins when filled with meat and juice are sealed and then sterilized at a high temperature. Substantially the same process is followed in preparing the domestic and imported article. Various sizes of tins are used and there is some variation in the relative amount of meat and juice in tins of the same size.

DOMESTIC PRODUCTION

The Pacific razor clam is produced along the beaches of Alaska, Washington, and Oregon, in the vicinities of Cordova, Alaska, Grays Harbor, and Willapa Bay, Wash., and the mouth of the Columbia River. During the canning season of 1932 there were 31 canneries engaged in packing razor clams.

Table 1 shows the domestic production of razor clams from 1921 to 1932.

TABLE 1.—*Razor clams packed in airtight containers: United States production, 1921–32*

Year	Quantity [1]	Value
	Cases	
1921	85,612	$506,591
1922	141,932	876,364
1923	116,773	883,535
1924	125,011	863,126
1925	110,396	869,002
1926	94,459	795,256
1927	130,016	1,046,797
1928	105,280	936,394
1929	69,871	614,130
1930	74,465	673,845
1931:		
Whole:		
No. 1, 5-ounce (48 cans)	3,819	37,808
No. 2, 10-ounce (24 cans)	140	1,260
Other sizes (standard cases)	104	822
Minced:		
½-pound flat, 4-ounce (48 cans)	61,254	427,428
No. 1, 5-ounce (48 cans)	20,712	176,058
No. 2, 10-ounce (24 cans)	1,056	9,188
Other sizes (standard cases)	2,307	21,873
Total	89,392	674,437
Total (standard cases)	77,141	

[1] The quantities shown for the years 1921–30 are standard cases representing the various sized cases converted to the equivalent of 48 no. 1, 5-ounce, tins to the case.

TABLE 1.—*Razor clams packed in airtight containers: United States production, 1921–22*—Continued

Year	Quantity	Value
29		
1932:		
Whole:	*Cases*	
No. 1, 5-ounce (48 cans)	3,716	$34,581
No. 2, 10-ounce (24 cans)		
Other sizes (standard cases)	1,962	14,675
Minced:		
½-pound flat, 4-ounce (48 cans)	91,155	577,134
No. 1, 5-ounce (48 cans)	10,518	88,332
No. 2, 10-ounce (24 cans)	178	1,477
Other sizes (standard cases)	447	2,940S
Total	107,976	718,539
Total (standard cases)	89,745	

Source: Fishery Industries of the United States, Bureau of Fisheries, Department of Commerce.

EXPORTS

United States exports of canned razor clams are negligible.

IMPORTS AND PRINCIPAL COMPETING COUNTRY

Imports of razor clams come entirely from Canada. Annual statistics of United States imports are available for 1931, 1932, and 1933 only, and amounted to 96,000 pounds, 151,312 pounds, and 41,130 pounds, respectively.

According to "Trade of Canada", the exports from Canada to the United States for the fiscal years ended March 31, 1926–30, ranged from 841,600 pounds in 1926 to 1,397,000 pounds in 1930 and averaged 1,070,820 pounds. During the fiscal years ended March 31, 1932 and 1933, the Canadian exports to the United States amounted to only 226,800 pounds and 127,700 pounds, respectively.

Table 2 shows the United States imports from Canada for the calendar years 1931, 1932, and 1933.

TABLE 2.—*Razor clams packed in airtight containers: United States imports from Canada, 1931–33*

Calendar year	Quantity	Value
	Pounds	
1931	96,000	$20,244
1932	151,312	27,224
1933	41,130	7,551

Source: Department of Commerce; monthly statistics of imports for consumption, unpublished.

COMPARABILITY OF DOMESTIC AND IMPORTED RAZOR CLAMS

The Canadian razor clam is the same species and is put up in the same manner as the domestic razor clam, and the two articles sell at substantially the same price in San Francisco, the center of competition. In both Canada and the United States the bulk of the pack consists of minced meat.

Razor clams sell in San Francisco at about double the price of other species. The higher prize of the razor clam is due in part to its light color and the well-established demand for it by name.

Table 3 gives the wholesale prices of canned razor clams in San Francisco in September 1931 and 1932 per case, and the computed price per pound net weight and per pound drained weight.

TABLE 3.—*Razor clams, packed in airtight containers: Wholesale prices in San Francisco, Calif., during September 1931 and 1932*

Item		Canned razor clams	
		Minced, in 7-ounce tins	Whole, in 10-ounce tins
Number of tins per case		48	48
Weight of tin contents:			
Per tin:			
Net	ounces	7	10
Drained	ounces	3.5	5
Per case:			
Net	pounds	21	30
Drained	pounds	10.5	15
Wholesale price in San Francisco in September:			
1931:			
Per case	dollars	7.10	9.12
Per pound:			
Net weight	cents	33.8	30.4
Drained weight	cents	67.6	60.8
1932:			
Per case	dollars	7.11	8.90
Per pound:			
Net weight	cents	33.9	29.7
Drained weight	cents	67.8	59.4

COSTS OF PRODUCTION

Costs of production of canned razor clams were obtained for eight plants in Washington, Oregon, and Alaska for the canning season (April, May, and June) of 1931 and 1932. The plants for which costs were obtained produced 60,970 cases in 1931 and 23,977 cases in 1932, or 68 and 22 percent, respectively, of the total domestic Pacific coast pack of razor clams in each of the 2 years. The total cost was higher in 1932 because of the increased cost of raw clams, the price of which is fixed in advance of the packing season. The other items of cost, taken together, were about the same in both years.

To determine the average costs of production according to sizes of containers the items of cost were allocated as follows:

(1) Raw clams, cans, cases, and labels were charged directly according to the quantities used in each type of pack;

(2) Direct labor, fuel, and power were charged in proportion to the total quantity of clam meat used in each type of pack; and

(3) Overhead expense, including repairs, maintenance, depreciation, interest on investment, insurance, taxes, and officers and office salaries were allocated in proportion to the sales-value ratio of each type of pack, after deducting direct costs.

Costs of production were obtained in Canada for 1931 and 1932 for the only plant engaged in packing razor clams. The costs for this plant were allocated to the various sizes of tins packed in the same manner as domestic costs.

31 As publication of costs of production of razor clams would disclose individual enterprise they are not included in this report.

MARKETS AND TRANSPORTATION COSTS

California is the principal market for domestic and imported canned razor clams, and San Francisco is the center of competition. The Canadian product and the bulk of the domestic are shipped to San Francisco by combination rail and steamer.

Table 4 summarizes the costs of transportation and other delivery charges from points of production to San Francisco; detailed statistics are given in the statistical appendix.

TABLE 4.—*Razor clams packed in airtight containers: Costs of transportation and other delivery charges from centers of production to San Francisco, Calif., 1931 and 1932*[1]

Item	Tins per case	Cost per case	
		1931	1932
Domestic razor clams:	*Number*	*Cents*	*Cents*
Minced, in tins of—			
7 ounces net	48	28.15	28.15
10 ounces net	48	32.01	32.01
20 ounces net	24	30.39	30.39
Whole, in tins of—			
20 ounces net	48	34.81	34.81
36 ounces net	48	49.94	49.94
104 ounces net	6	39.89	39.89
Canadian razor clams:			
Minced, in tins of—			
7 ounces net	48	41.26	41.26
10 ounces net	48	41.26	41.26

[1] For detailed statistics of transportation costs and other delivery charges see statistical appendix, p. 23.

PART II. OTHER CLAMS

DESCRIPTION AND USES

Numerous species of clams other than razor clams are put up in tins. Some of the species used are distinct in color, size, and flavor, and are marketed under names which identify them either specifically or generally. Outstanding classes of domestic clams, other than the razor clam of the Pacific Northwest, are the soft clam of New England, and various species of hard clams, found along the entire coast. The so-called "white" clam and "baby" clam of Japan constitute about 99 percent of imports, excluding razor clams.

Small clams are usually packed whole: intermediate sizes, with the entrails removed; and large sizes, minced. All clams are packed in clam juice collected during the canning process. Substantially the same process is followed in preparing the domestic and imported articles. The meat is packed in clam juice in tins, sealed, and sterilized in retorts. Various sizes of tins are used and there is some variation in the relative amount of meat and juice in tins of the same size.

A more detailed discussion of species and grades is given under "Comparability of Domestic and Imported Claims."

DOMESTIC PRODUCTION

In 1931 the domestic production of canned clams (excluding razor clams) was 122,842 cases, valued at $533,759, divided as follows:

	Cases	Value
Pacific hard clams	10,135	$56,260
Atlantic soft clams	93,938	342,763
Atlantic hard clams	18,769	134,736
Total	122,842	533,759

As noted under "Scope of the Investigation," Pacific hard clams are the domestic products which compete mainly with imports from Japan. Pacific hard clams are produced along the beaches of Puget Sound, Wash., and Alaska. During the canning season of 1932 there were seven canneries engaged in packing hard clams on the Pacific coast.

Table 5 gives the value of domestic production of canned clams (except razor clams) from 1921 to 1932; table 6 gives detailed statistics of the domestic pack of clams (except razor clams) in 1931 and 1932; and table 7 gives detailed statistics of the domestic Pacific coast pack of hard clams in 1931.

33 TABLE 5.—*Clams (except razor clams) packed in airtight containers: Value of domestic production, 1921–32*

Year	Hard clams	Soft clams	Total	Year	Hard clams	Soft clams	Total
1921	$138,699	$338,775	$477,474	1927	$231,526	$270,747	$502,273
1922	201,270	327,287	528,557	1928	203,959	318,510	522,469
1923	194,937	308,560	503,497	1929	259,435	321,386	580,821
1924	271,911	459,882	731,793	1930	192,740	341,035	533,775
1925	218,601	287,073	505,674	1931	190,906	342,763	533,759
1926	197,044	279,996	471,040	1932	106,400	269,231	375,631

Source: Fishery Industries of the United States.

TABLE 6.—*Clams (except razor clams) packed in airtight containers: Detailed statistics of United States production in 1931 and 1932* [1]

Items and States	1931		1932	
	Cases	Value	Cases	Value
Hard clams (Rhode Island, New York, New Jersey, Georgia, Florida, Washington, and Alaska):				
Whole:				
No. 1, 5-ounce (48 cans)	4,670	$39,833		
1-pound 8-ounce (48 cans)	3,133	21,751	1,032	$6,846
No. 2, 10-ounce (24 cans)	7,700	48,312	2,832	17,654
No. 10, 52-ounce (6 cans)	4,250	21,250	1,817	8,368
Other sizes (standard cases)	763	3,879	2,145	16,590
Minced:				
½-pound 4-ounce (48 cans)			4,091	15,703
No. 1, 5-ounce (48 cans)	908	6,801	986	5,380
No. 2, 10-ounce (24 cans)	1,483	10,383		
Other sizes (standard cases)	5,997	38,787	5,456	35,859
Total	28,904	190,996	18,359	106,400
Soft clams (Maine and Massachusetts):				
Whole:				
No. 1, 5-ounce (48 cans)	66,333	240,763	56,791	209,786
1-pound, 8-ounce (48 cans)	7,945	46,734	3,040	13,830
No. 2, 10-ounce (24 cans)	10,159	34,473	10,486	30,522
Other sizes (standard cases)	9,301	20,793	3,529	15,093
Total	93,938	342,763	73,846	269,231
Grand total	122,842	533,759	92,205	375,631

[1] Source: United States Bureau of Fisheries, Statistical Bulletins Nos. 977 and 1026. "Standard cases" represent the various sized cases converted to the equivalent of 48 No. 1, 5-ounce, cans to the case. In 1932 hard clams were canned at 1 plant in Massachusetts, 1 in Rhode Island, 5 in New York, 1 in New Jersey, 1 in Florida, 6 in Washington, and 1 in Alaska; soft clams at 17 plants in Maine and 1 in Massachusetts; and coquina clams at 2 plants in Florida.

TABLE 7.—*Hard clams packed in airtight containers: United States Pacific coast production, 1931*

Type of pack and size of tin [1]	Tins per case	Quantity	Value
Hard clams:			
Minced:	*Number*	*Cases*	
Flat, 8-ounce	48	305	$1,333
No. 1, 10-ounce E. O	48	457	2,623
No. 2, 20-ounce	24	128	612
Whole:			
Flat, 8-ounce	48	203	893
No. 1, 10-ounce E. O	48	495	2,718
16-ounce	48	2,301	15,979
No. 2, 20-ounce	24	2,098	10,070
No. 10, 104-ounce	6	4,243	22,032
Total		10,135	56,260

[1] The weight of the tin contents here shown is the net weight (not the drained weight).

United States exports of canned clams are negligible.

IMPORTS AND PRINCIPAL COMPETING COUNTRY

Japan is the chief source of imports of canned clams. In 1933 Japan supplied 94 percent of the total value of imports and 99½ percent of the total value, excluding razor clams. The imports from Japan are chiefly baby clams and white clams.

Table 8 gives the available statistics on imports of canned clams, except razor clams, from 1926 to 1933.

TABLE 8.—*Clams and clam products packed in airtight containers (except razor clams): United States imports, 1926–33*

Calendar year	Japan		Other countries		Total		Rate of duty	Value of imports per pound
	Quantity	Value	Quantity	Value	Quantity	Value		
	Pounds		*Pounds*		*Pounds*		*Percent*	*Cents*
1926	None		Small	(1)	Small	(1)	Free	(1)
1927	Small	(1)	Small	(1)	Small	(1)	Free	(1)
1928		[2]$30,000	Small	(1)	(1)	(1)	Free	(1)
1929–30	(1)	(1)	(1)	(1)	(1)	(1)	Free	(1)
1931 [3]	947,438	121,232	12,858	$2,612	960,296	$133,844	35	13.9
1932 [3]	1,312,442	125,598	20,140	949	1,332,582	126,547	35	9.5
1933 [3]	1,371,278	123,788	4,907	517	1,376,185	424,305	35	9.0

[1] No data available.
[2] Estimated by importers.
[3] Source: Monthly statistics of imports for consumption, unpublished.

COMPARABILITY OF DOMESTIC AND IMPORTED CLAMS

The domestic production of canned clams (except razor clams) falls into two general classes:

1. The Atlantic and Gulf pack of hard and soft clams.
2. The Pacific coast pack of hard clams (little-neck and butter).

The bulk of imports into the United States comes from Japan and consists of baby clams and white clams entered at San Francisco where they meet in competition with the domestic Pacific coast pack of hard clams. The shipments of Atlantic coast clams to San Francisco consist almost entirely of soft clams packed in Maine. They usually sell for a lower price than the domestic Pacific coast hard clams and there are no imports into the Pacific coast of soft clams.

Before the depreciation of Japanese currency, imports from Japan sold at wholesale in San Francisco for about the same price as domestic hard clams (little-neck and butter clams). The Japanese articles, however, are sold more extensively for household use.

Although Japanese baby and white clams and the domestic little-neck and butter clams serve the same purposes and sell at about the same price, there are intrinsic differences in the species and in the physical condition of the clams when packed. The Japanese clams are packed whole;[1] the domestic little-neck and butter clams consist of meat only and part of the pack is minced. There are minor differences in size, color, and flavor, which to some extent are reflected in prices.

Table 9 gives the wholesale prices of canned clams (except razor clams) in San Francisco in September 1931 and 1932 per case, and the computed price per pound net weight and per pound drained weight.

TABLE 9.—*Clams, packed in airtight containers (except razor clams): Wholesale prices in San Francisco, Calif., during September 1931 and 1932*

Source, species, and grade[1]	Tins per case	Weight of tin contents				Wholesale price San Francisco, September—					
		Per tin		Per case		1931			1932		
							Per pound			Per pound	
		Net	Drained weight	Net	Drained weight	Per case	Net weight	Drained weight	Per case	Net weight	Drained weight
		Oz.	*Oz.*	*Lb.*	*Lbs.*		*Cents*	*Cents*		*Cents*	*Cents*
Domestic little neck:											
Whole, 16-ounce net	48	16	8	48.0	24.0	$7.54	15.7	31.4	$6.94	14.5	29.0
Whole, 100-ounce net	6	100	50	37.5	18.7	5.71	15.2	30.5	5.06	13.5	27.0
Domestic butters:											
Minced, 8-ounce net	48	8	4	24.0	12.0	(2)	(2)	(2)	4.40	18.3	36.6
Whole, 16-ounce net	48	16	8	48.0	24.0	7.00	14.6	29.2	6.60	13.8	27.6
Whole, 100-ounce net	6	100	50	37.5	18.7	5.19	13.8	27.8	4.64	12.4	24.8
Japanese baby:											
Whole, 10-ounce net	48	10	5	30.0	15.0	4.54	15.1	30.3	3.36	11.2	22.4
Whole, 15-ounce net	48	15	8	45.0	24.0	6.65	14.8	27.7	5.50	12.2	22.9
Whole, 30-ounce net	24	30	16	45.0	24.0	6.50	14.4	27.1	5.15	11.4	22.5
Japanese white:											
Whole, 15-ounce net	48	15	8	45.0	24.0	6.96	15.5	29.0	5.50	12.2	22.9

[1] The domestic article is usually referred to by type of container or net weight of contents; the Japanese usually by drained weight of contents. The basis for comparison is given in columns 3 and 4 under net and drained weight per tin.
[2] No data available.

DOMESTIC COSTS OF PRODUCTION

Costs of production of canned little neck and butter clams were obtained for the three plants engaged in packing these species on the Pacific coast during 1931 and 1932. The principal items of cost, raw clams and labor, declined in 1932, but most of the other items of cost increased mainly because the quantity packed in 1932 was less than half the quantity packed in 1931. The total cost was slightly higher in 1932.

[1] There are small imports of minced Hokki clams from Japan for consumption by orientals.

To determine the average costs of production according to sizes of containers the items of cost were allocated as follows:

(1) Raw clams, cans, cases, and labels were charged directly according to the quantities used in each type of pack;

(2) Direct labor, fuel, and power were charged in proportion to the total quantity of clam meat used in each type of pack; and

(3) Overhead expense, including repairs, maintenance, depreciation, interest on investment, insurance, taxes, and officers and office salaries were allocated in proportion to the sales value ratio of each type of pack, after deducting direct costs.

36 Table 10 gives a summary of the costs of production of canned clams (except razor clams) on the Pacific coast of the United States in 1931 and 1932; detailed statistics of costs are given in the statistical appendix.

TABLE 10.—*Clams (except razor clams) packed in airtight containers: Costs of production on the Pacific coast of the United States in 1931 and 1932*[1]

Species, type of pack, and net weight of tins	Tins per case	Cost per case		
		1931	1932	Average
Butter clams:				
Minced, in tins of—				
7 ounces net	48	$3.029	$3.522	$3.276
8 ounces net	48	3.124	3.558	3.341
10 ounces net	48	4.058	4.252	4.155
16 ounces net	48	6.150	6.400	6.275
20 ounces net	24	3.734	3.678	3.706
Whole, in tins of—				
16 ounces net	48	5.342	5.989	5.666
20 ounces net	24	3.367	3.966	3.666
100 ounces net	6	3.693	4.106	3.900
Little-neck clams:				
Whole, in tins of—				
8 ounces net	48	3.062	3.552	3.307
10 ounces net	48	4.306	4.254	4.280
16 ounces net	48	5.791	6.387	6.089
20 ounces net	24	3.825	4.297	3.961
100 ounces net	6	4.276	4.490	4.383
All clams in tins of—				
10 ounces net	48	4.223	4.253	4.238
16 ounces net	48	5.577	6.096	5.836

[1] Detailed statistics showing items of cost are given in the statistical appendix.

FOREIGN COSTS OF PRODUCTION

As costs of raw material and packing in Japan, the principal source of imports, were not readily ascertainable, the Commission analyzed records of imports entered at San Francisco, the principal port of entry, for the 22-month period, December 1, 1930, to September 30, 1932, for the purpose of obtaining average import prices as evidence of Japanese costs of production.

Table 11 gives the dutiable value and packed value of canned clams in Japan for the period December 1, 1930, to September 30, 1932.

37 TABLE 11.—*Clams packed in airtight containers: Dutiable value and packed value in Japan per case of 48 tins, Dec. 1, 1930, to Sept. 30, 1932*[1]

[The average rate of exchange for the year 1932 was $0.2811]

Period and item	Drained weight of tin contents	Cases included in analysis	Value per case of 48 tins					
			Dutiable value			Packed value		
			In Japanese currency	Converted to United States currency		In Japanese currency	Converted to United States currency	
				At prevailing rate of exchange on date of exportation	At average rate of exchange for the year 1932		At prevailing rate of exchange on date of exportation	At average rate of exchange for the year 1932
12 months ended Nov. 30, 1931:								
Whole baby clams in tins containing—	*Ounces*	*Number*	*Yen*			*Yen*		
10 ounces net weight	5	10,550	6.0824	$3.4034	$1.7098	5.6387	$2.7843	$1.5851
15 ounces net weight	8	400	8.6366	4.2647	2.4279	8.6063	4.2497	
Whole white clams in tins containing—								
10 ounces net weight	5	500	6.5115	3.2153	1.8305	6.5115	3.2153	1.8305
15 ounces net weight	8	2,600	8.9645	4.4265	2.5200	8.3753	4.1356	2.3544
10 months ended Sept. 30, 1932:								
Whole baby clams in tins containing—								
10 ounces net weight:								
December	5	663	6.7095	2.9162	1.8860	6.7095	2.7843	1.5851
January	5	1,673	5.6065	2.0176	1.5761	5.0295	1.8100	1.4139
February	5	100	6.0018	2.0600	1.6872	6.0018	2.0600	1.6872
March	5	300	5.9268	1.9058	1.6661	5.9268	1.9058	1.6661
April–August			(2)	(2)	(2)	(2)	(2)	(2)
September	5	1,500	6.0809	1.4394	1.7122	5.3600	1.2686	1.5088
Whole white clams in tins containing—								
15 ounces net weight:								
December	8	350	9.5270	4.1494	2.6779	9.4211	4.0948	2.6484
January	8	(2)	(2)	(2)	(2)	(2)	(2)	(2)
February	8	197	8.8392	3.0339	2.4848	8.9080	3.0784	2.5213
March–September		(2)	(2)	(2)	(2)	(2)	(2)	(2)
Weighted average, baby and white clams in tins containing—								
10 ounces net weight	5	15,286	6.0688	2.7175	1.7060	5.6277	2.5266	1.5820
15 ounces net weight	8	3,547	8.9746	4.3027	2.5233	8.5375	4.0858	2.4000

[1] Based on an analysis of imports at San Francisco for 22 months, Dec. 1, 1930, to Sept. 30, 1932, covering entries having a dutiable value of $64,176 of which $44,821 or 70 percent was baby clams; $15,164 or 24 percent white clams; and $5,799 or 6 percent nonspecified imports. Of the baby clams $39,932 or 89 percent was packed in 5-ounce tins (10 ounces net weight); $1,706 or 4 percent in 8-ounce tins (15 ounces net weight); and $2,992 or 7 percent in 10-ounce tins; of the white clams $1,608 or 11 percent was packed in 5-ounce tins (10 ounces net weight), and $13,556 or 89 percent in 8-ounce tins (15 ounces net weight).

[2] Negligible imports.

MARKETS AND TRANSPORTATION COSTS

California is the principal market for domestic and imported canned clams, and San Francisco is the center of competition. Shipments to San Francisco from Japan are made directly by

steamer; the bulk of the domestic moves by combination rail and steamer.

Table 12 summarizes the costs of transportation and other delivery charges from points of production to San Francisco; detailed statistics are given in the statistical appendix. Those items of transportation and delivery which were expressed in yen have been converted to dollars at the average rate of exchange for the year 1932, namely $0.2811.

38 TABLE 12.—*Clams (except razor clams) packed in airtight containers: Costs of transportation and other delivery charges from centers of production to San Francisco, Calif., 1931 and 1932* [1]

Source, species, condition, and net content of tin	Tins per case	Cost per case	
		1931	1932
Domestic butter clams:			
Minced, in tins of—	*Number*	*Cents*	*Cents*
7 ounces net	48	25.97	25.97
8 ounces net	48	26.05	26.05
10 ounces net	48	25.94	25.94
16 ounces net	48	41.66	41.66
20 ounces net	24	26.03	26.03
Whole, in tins of—			
16 ounces net	48	41.58	41.58
20 ounces net	24	26.03	26.03
100 ounces net	6	31.17	31.17
Domestic little-neck clams:			
Whole, in tins of—			
8 ounces net	48	25.97	25.97
10 ounces net	48	26.17	26.17
16 ounces net	48	41.71	41.71
20 ounces net	24	26.05	26.05
100 ounces net	6	31.27	31.27
Japanese baby clams:			
Whole, in tins of—			
10 ounces net	48	29.13	32.14
15 ounces net	48	38.51	(2)
Japanese white clams:			
Whole, in tins of—			
10 ounces net	48	30.60	(2)
15 ounces net	48	38.12	27.58

[1] For detailed statistics of transportation costs and other delivery charges see statistical appendix.
[2] No data available.

COMPARATIVE COSTS

Table 13 shows for selected grades of domestic and imported hard clams the costs of production and transportation and the amount of duty necessary to equalize cost differences. The Japanese costs (as evidenced by invoice prices), and the dutiable values, have been converted from yen to dollars at the average rate of exchange for the year 1932, namely, $0.2811.

TABLE 13.—*Clams (except razor clams), packed in airtight containers: Summary of cost comparison, 1931 and 1932*

Item	Per case containing 48 tins of—	
	10 ounces net weight	15–16 ounces net weight
Domestic cost:		
At factory	$4.24	$5.84
Transportation and other delivery charges	.26	.42
Total	4.50	6.26
Foreign cost:		
At factory (as evidenced by invoice values)	1.58	2.40
Transportation and other delivery charges	.30	.37
Total	1.88	2.77
Excess of domestic cost	2.62	3.49
Dutiable value of foreign product	1.71	2.52
Rate of duty necessary to equalize costs (based on dutiable value of foreign product) percent	153	138
American selling price of domestic product	$5.51	$7.02
Rate of duty necessary to equalize costs (based on American selling price of domestic product) percent	48	50

39 RATES OF EXCHANGE

The par value of the Japanese yen in terms of United States dollars is $0.4985. Japan went off the gold standard on December 13, 1931, and the value of the yen declined steadily until November 1932, when it was worth only $0.2062. Since then it has increased in value.

Table 14 shows the average monthly value of Japanese currency for the years 1931, 1932, and 1933.

TABLE 14.—*Japanese yen in terms of United States dollars, 1931–33*

Month	Year			Month	Year		
	1931	1932	1933		1931	1932	1933
January	$0.4944	$0.3599	$0.2074	August	$0.4935	$0.2449	$0.2690
February	.4941	.3432	.2079	September	.4934	.2363	.2725
March	.4937	.3216	.2126	October	.4925	.2306	.2777
April	.4936	.3281	.2369	November	.4930	.2062	.3036
May	.4938	.3197	.2400	December	.4346	.2073	.3074
June	.4937	.3039	.2576				
July	.4936	.2745	.2877	Average	.4885	.2811	.2565

Source: Federal Reserve Bulletin.

40 PART III. CLAM PRODUCTS

(Juice, Chowder, Paste, Sauce)

PRODUCTION, IMPORTS, AND EXPORTS

Clam products packed in airtight containers consist of clam chowder, clam juice, clam nectar, clam paste, and clam sauce.

There are no imports of clam chowder and exports are negligible. Clam paste and clam sauce are not produced in the United States, the limited domestic consumption being supplied entirely by imports. Clam juice and clam nectar are by-products of the clam-canning industry. Imports, if any, probably come from Canada. It is believed, however, that consumption is limited to the domestic product.

Domestic production of canned clam products (other than canned clams) packed in airtight containers is limited to clam chowder, clam juice, clam cocktail, clam broth, and clam bouillon. Clam chowder is the product of major importance; the other articles are by-products of the clam-canning and clam chowder-canning industry.

Most of the production of clam chowder is from hard and soft clams, and the industry is confined almost entirely to the Atlantic and Gulf coasts. The other clam products are packed wherever clams or clam chowder are produced.

Table 15 shows detailed statistics of United States production of clam products for the years 1931 and 1932. Statistics covering imports and exports are not available. Imports are known to be small.

No domestic or foreign costs of these products were obtained by the Commission.

TABLE 15.—*Clam products (except clams) packed in airtight containers. Detailed statistics of United States production in 1931 and 1932* [1]

Item and States		1931		1932	
		Cases	Value	Cases	Value
Razor clams (Washington, Oregon, and Alaska):					
Juice:					
All sizes (standard cases)		364	$1,120	537	$1,886
Hard clams (Rhode Island, New York, New Jersey, Georgia, Florida, Washington, and Alaska): [2]					
Chowder:					
No. 1, 10-ounce	48 cans	163,857	604,266	79,209	285,568
33-ounce	24 jars	133	1,319	12,457	89,625
No. 10, 102-ounce	6 cans			1,957	12,017
Other sizes	standard cases	56,291	234,384	24,219	121,331
Juice:					
No. 1, 10-ounce	48 cans	527	1,716	906	5,878
No. 10, 102-ounce	6 cans	1,697	5,489	1,791	6,663
Other sizes	standard cases	3,223	17,625	2,120	9,208
Cocktail:					
3- and 4-ounce	48 jars	1,092	7,374	535	2,300
8 ounce	24 jars	249	1,387		
Other sizes	standard cases	216	2,513	407	3,891
Broth and bouillon: [3]					
3½- and 4-ounce	48 jars	209	1,302	(3)	(3)
10-ounce	48 jars	1,148	6,411	(3)	(3)
Other sizes	standard cases	3,082	16,311	4,279	25,002
Total		231,814	900,097	127,880	561,483

[1] Source: United States Bureau of Fisheries, Statistical Bulletins Nos. 977 and 1026. "Standard cases" represent the various size cases converted to the equivalent of 48 No. 1, 10-ounce cans to the case.

[2] Includes a small amount of coquina broth packed in Florida.

[3] Included with "Other sizes."

TABLE 15.—*Clam products (except clams) packed in airtight containers: Detailed statistics of United States production in 1931 and 1932*—Con.

Item and States		1931		1932	
		Cases	Value	Cases	Value
4: Soft clams (Maine and Massachusetts):					
Chowder: 3					
No. 1, 10-ounce	48 cans	17,082	$53,856	13,331	$45,653
No. 2, 20-ounce	24 cans	1,132	3,923		
33-ounce	24 cans			12,225	37,286
Other sizes	standard cases	27,180	54,898	7,932	37,918
Bouillon and juice:					
No. 2, 20-ounce	24 cans	5,788	16,419	3,117	5,900
Other sizes	standard cases	8,951	24,400	5,394	12,706
Total		60,133	147,496	41,999	139,463
Grand total		292,311	1,048,713	170,416	702,832

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APPENDIXES

APPENDIX I

STATISTICAL DATA

Detailed statistics of costs of production are given in the following tables:

Table 16. Domestic costs of little-neck and butter clams in 1931.

Table 17. Domestic costs of little-neck and butter clams in 1932.

Table 18. Domestic costs of transporting razor clams in 1931 and 1932.

Table 19. Domestic costs of transporting little-neck and butter clams in 1931 and 1932.

Table 20. Japanese costs of transporting baby and white clams from December 1, 1930, to September 30, 1932.

Table 21. Canadian costs of transporting razor clams in 1931 and 1932.

Table 22. Production and shipments to the Pacific coast of clams packed in Maine.

TABLE 16.—*Canned hard clams, domestic Pacific coast: Costs of production per case (excluding transportation), 1931*

Item	Minced butter clams					Whole butter clams			Whole little-neck clams				
	7-ounce tins, 48 to case (½ flat)	8-ounce tins, 48 to case (buffet)	10-ounce tins, 48 to case (no. 1 E.O.)	16-ounce tins, 48 to case (salmon)	20-ounce tins, 24 to case (no. 2 tall)	16-ounce tins, 48 to case (salmon)	20-ounce tins, 24 to case (no. 2 tall)	100-ounce tins, 6 to case (no. 10)	8-ounce tins, 48 to case (buffet)	10-ounce tins, 48 to case (no. 1 E.O.)	16-ounce tins, 48 to case (salmon)	20-ounce tins, 24 to case (no. 2 tall)	100-ounce tins, 6 to case (no. 10)
Costs:													
Materials and supplies:													
Clams	$0.548	$0.652	$0.667	$1.323	$1.126	$1.495	$0.833	$1.132	$0.650	$0.886	$1.668	$0.794	$1.221
Cans	.924	.776	.820	1.087	.622	1.069	.623	.441	.796	.884	1.062	.640	.338
Labels	.141	.134	.145	.097	.060	.128	.086	.017	.144	.118	.124	.055	.014
Cases	.120	.120	.148	.173	.135	.180	.136	.151	.120	.155	.179	.143	.151
Factory operations:													
Labor	.618	.648	.782	1.503	.805	1.281	.806	.971	.685	.836	1.303	.869	1.070
Fuel	.033	.036	.086	.453	.083	.105	.061	.081	.038	.081	.127	.080	.112
Overhead:													
Repairs and maintenance	.010	.031	.067	.060	.039	.029	.017	.021	.000	.059	.046	.030	.044
Officers' and office salaries	.264	.229	.346	.467	.246	.363	.288	.310	.259	.359	.388	.269	.335
Rent			.066	.163	.032	.037	.027	.031		.052	.063	.075	.093
Insurance	.048	.041	.065	.093	.046	.066	.054	.058	.047	.067	.073	.059	.066
Taxes	.133	.135	.186	.187	.133	.177	.137	.149	.180	.193	.190	.129	.149
Depreciation	.044	.102	.238	.267	.138	.120	.079	.094	.043	.210	.181	.138	.188
Interest on investment	.056	.155	.347	.347	.201	.161	.102	.122	.055	.306	.251	.178	.252
Miscellaneous	.087	.045	.095	.230	.068	.129	.108	.115	.086	.100	.136	.134	.143
Total cost per case	3.029	3.124	4.058	6.150	3.734	5.342	3.367	3.693	3.062	4.306	5.791	3.625	4.276

45 TABLE 17.—*Canned hard clams, domestic Pacific coast: Costs of production per case (excluding transportation), for the first 8 months of 1932*

Item	Minced butter clams					Whole butter clams			Whole little-neck clams				
	7-ounce tins, 48 to case (½ flat)	8-ounce tins, 48 to case (buffet)	10-ounce tins, 48 to case (no. 1 E. O.)	16-ounce tins, 48 to case (salmon)	20-ounce tins, 24 to case (no. 2 tall)	16-ounce tins, 48 to case (salmon)	20-ounce tins, 24 to case (no. 2 tall)	100-ounce tins, 6 to case (no. 10)	8-ounce tins, 48 to case (buffet)	10-ounce tins, 48 to case (no. 1 E. O.)	16-ounce tins, 48 to case (salmon)	20-ounce tins, 24 to case (no. 2 tall)	100-ounce tins, 6 to case (no. 10)
Costs:													
Materials and supplies:													
Clams	$0.292	$0.381	$0.522	$0.827	$0.540	$0.860	$0.370	$0.809	$0.378	$0.521	$0.834	$0.520	$0.746
Cans	.920	.792	.890	1.047	.624	1.063	.626	.439	.793	.889	1.062	.626	.440
Labels	.144	.144	.149	.080	.072	.112	.046	.010	.144	.129	.108	.042	.011
Cases	.110	.110	.110	.180	.123	.186	.148	.176	.110	.150	.187	.153	.173
Factory operations:													
Labor	.720	.826	.836	1.067	1.025	1.332	.618	.856	.822	.831	1.294	.684	.891
Fuel	.098	.078	.088	.127	.097	.140	.070	.102	.078	.088	.138	.091	.103
Overhead:													
Repairs and maintenance	.057	.055	.105	.227	.054	.142	.147	.126	.055	.107	.179	.161	.152
Officers' and office salaries	.547	.530	.565	.900	.517	.782	.640	.502	.530	.564	.925	.642	.643
Rent	.231	.224	.174	.200	.218	.248	.159	.112	.224	.173	.277	.143	.155
Insurance	.101	.097	.087	.120	.095	.123	.090	.067	.097	.087	.141	.086	.089
Taxes	.125	.121	.173	.333	.118	.236	.223	.184	.121	.174	.290	.236	.227
Depreciation	.091	.088	.231	.533	.086	.307	.343	.298	.088	.234	.397	.381	.356
Interest on investment	.116	.112	.299	.693	.109	.398	.446	.388	.112	.303	.514	.496	.462
Miscellaneous			.023	.066		.030	.040	.036		.024	.041	.046	.042
Total cost per case	3.522	3.558	4.252	6.409	3.678	5.989	3.966	4.106	3.552	4.254	6.387	4.297	4.490

46 TABLE 18.—*Razor clams packed in airtight containers, United States Pacific coast: Weighted average costs of transportation from points of production where costs were obtained to San Francisco, Calif., 1931–32*

Item	Minced razor clams			Whole razor clams		
	7-ounce tins, 48 to case	10-ounce tins, 48 to case	20-ounce tins, 24 to case	10-ounce tins, 48 to case	16-ounce tins, 48 to case	104-ounce tins, 6 to case
	Cents	*Cents*	*Cents*	*Cents*	*Cents*	*Cents*
Wharfage [1]	1.05					
Transportation from shipping point to steamer connection [2]	9.20	9.56	9.00	10.68	16.25	12.50
Transfer charge at steamer connection	1.11	2.31	3.00	3.49	5.42	4.14
Transportation from connecting points to San Francisco	10.50	13.43	11.88	13.86	21.45	16.50
Marine insurance	1.15	1.50	1.33	1.57	1.50	1.50
Toll at San Francisco	.16	.21	.18	.21	.32	.25
Hauling to warehouse	5.00	5.00	5.00	5.00	5.00	5.00
Total transportation costs:						
Per case	28.15	32.01	30.39	34.81	49.94	39.89
Per can	.59	.67	1.27	.73	1.04	6.65
Per pound net weight	1.34	1.07	1.01	1.16	1.04	1.07

[1] Includes wharfage at Cordova, Alaska, and Seattle, Wash.
[2] Steamer connections at Seattle, Wash., and Portland and Astoria, Oreg.

TABLE 19.—*Butter and little-neck clams packed in airtight containers, United States Pacific coast: Weighted average costs of transportation from points of production where costs were obtained to San Francisco, Calif., 1931–32*

MINCED BUTTER CLAMS

Item	7-ounce tins, 48 to case	8-ounce tins, 48 to case	10-ounce tins, 48 to case	16-ounce tins, 48 to case	20-ounce tins, 24 to case	100-ounce tins, 6 to case
	Cents	*Cents*	*Cents*	*Cents*	*Cents*	*Cents*
Transportation costs from cannery to Seattle, Wash	8.80	8.80	8.80	12.33	8.80	
Transportation costs from Seattle, Wash., to San Francisco, Calif	11.20	11.20	11.20	19.67	11.20	
Marine insurance	.77	.85	.74	[illegible]	.83	
Harbor toll	.20	.20	.20	.33	.20	
Hauling to warehouse	5.00	5.00	5.00	5.00	5.00	
Total transportation costs:						
Per case	25.97	26.05	25.94	41.66	26.03	
Per can	.54	.54	.54	.87	1.08	
Per pound net weight	1.24	1.09	.86	.87	.87	

WHOLE BUTTER CLAMS

Transportation costs from cannery to Seattle, Wash				15.40	8.80	11.00
Transportation costs from Seattle, Wash., to San Francisco, Calif				19.90	11.20	14.00
Marine insurance				1.23	.83	.92
Harbor toll				.35	.20	.25
Hauling to warehouse				5.00	5.00	5.00
Total transportation costs:						
Per case				41.88	26.03	31.17
Per can				.87	1.08	5.19
Per pound net weight				.87	.87	.83

TABLE 19.—*Butter and little-neck clams packed in airtight containers, United States Pacific coast: Weighted average costs of transportation, etc.*—Con.

WHOLE LITTLE-NECK CLAMS

Item	7-ounce tins, 48 to case	8-ounce tins, 48 to case	10-ounce tins, 48 to case	16-ounce tins, 48 to case	20-ounce tins, 24 to case	100-ounce tins, 6 to case
Transportation costs from cannery to Seattle, Wash		8.80	8.80	13.40	8.80	11.00
Transportation costs from Seattle, Wash., to San Francisco, Calif		11.20	11.20	19.60	11.20	14.00
Marine insurance		.77	.86	1.36	.85	1.02
Harbor toll		.20	.21	.35	.20	.25
Hauling to warehouse		5.00	5.00	5.00	5.00	5.00
Total transportation costs:						
Per case		25.97	26.17	41.71	26.05	31.27
Per can		.54	.55	.87	1.09	5.21
Per pound net weight		1.08	.87	.87	.87	.83

47 TABLE 20.—*Clams packed in airtight containers: Costs of transportation and other delivery charges (excluding duty) on shipments from centers of production in Japan to San Francisco, Calif., Dec. 1, 1930, to Sept. 30, 1932*[1]

Item	Dec. 1, 1930, to Nov. 30, 1931	Dec. 1, 1931, to Sept. 30, 1932	Weighted average cost
	Cost per case of 48 10-ounce tins		
	Cents	*Cents*	*Cents*
Cartage and stowage	2.65	1.68	2.38
Ocean freight	9.72	18.56	12.17
Marine insurance	.48	.50	.49
Buying commission	9.13	4.37	7.81
Consular fee	.87	.78	.84
Customs broker fee	1.34	1.25	1.32
Cartage to store	5.00	5.00	5.00
Total	29.19	32.14	30.01
	Cost per case of 48 15-ounce tins		
Cartage and stowage	4.26	3.92	4.20
Ocean freight	12.49	14.18	12.74
Marine insurance	.51	.97	.75
Buying commission	13.50	9.48	11.65
Consular fee	.87	.78	.86
Customs broker fee	1.34	1.25	1.33
Cartage to store	5.00	5.00	5.00
Total	38.17	27.58	36.53

[1] For details concerning source, see table 21, p. 17.

TABLE 21.—*Clams packed in airtight containers: Costs of transportation and other delivery charges (excluding duty) on shipments from Masset, British Columbia, to San Francisco, Calif., 1931 and 1932*

Item of cost	Cost per case of 48 tins	Item of cost	Cost per case of 48 tins
Freight		Freight—Continued.	
Masset to Vancouver, British Columbia	*Cents* 9.45	Insurance, consular fee, and customs broker's entry fee	*Cents* 3.50
Vancouver, British Columbia, to Seattle, Wash	9.45	Cartage to store, San Francisco, Calif	5.00
Seattle, Wash., to San Francisco, Calif	13.86	Total cost	41.26

TABLE 22.—*Clams packed in Maine: Production and shipments to the Pacific coast, 1930–31*

Drained weight per tin	Tins per case	1930		1931	
		Total pack	Shipments to Pacific coast	Total pack	Shipments to Pacific coast
		Cases	*Cases*	*Cases*	*Cases*
5 to 6 ounces	48	53,266	4,595	53,181	12,509
8 to 9 ounces	48	9,872	2,918	8,277	4,366
10 ounces	24	7,493		6,170	15
Total		70,631	7,423	67,628	16,890

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APPENDIX II

CHANGING DUTY ON CANNED CLAMS

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

Whereas under and by virtue of section 336 of title III, part II, of the act of Congress approved June 17, 1930 (46 Stat. 590, 701), entitled "An Act To provide revenue, to regulate commerce with foreign countries, to encourage the industries of the United States, to protect American labor, and for other purposes", the United States Tariff Commission has investigated the differences in costs of production of; and all other facts and conditions enumerated in said section with respect to, clams, packed in air-tight containers, being wholly or in part the growth or product of the United States and of and with respect to like or similar articles wholly or in part the growth or product of the principal competing countries;

Whereas in the course of said investigation a hearing was held, of which reasonable public notice was given and at which parties interested were given reasonable opportunity to be present, to produce evidence, and to be heard;

Whereas the Commission has reported to the President the results of said investigation and its findings with respect to such differences in costs of production;

Whereas the Commisison has found it shown by said investigation that the principal competing country for razor clams (Siliqua patula), packed in air-tight containers, is Canada, and that the duty expressly fixed by statute does not equalize the difference in the costs of production of the domestic articles and the like or similar foreign articles when produced in said prin-

cipal competing country; and that the principal competing country for clams other than razor clams, and clams in combination with other substances (except clam chowder), packed in air-tight containers, is Japan, and that said difference with respect to these articles cannot be equalized by proceeding under the provisions of subsection (a) of said section and act;

Whereas the Commission has specified in its report the decreased rate of duty on razor clams (Siliqua patula), packed in air-tight containers, and the ad valorem rate of duty based on the American selling price, as defined in section 402 (g) of said act, of the domestic articles, on clams other than razor clams, and clams in combination with other substances (except clam chowder), packed in air-tight containers, found by the Commission to be shown by said investigation to be necessary to equalize such differences in costs of production; and

Whereas in the judgment of the President such decreased rate of duty and such ad valorem rate of duty based upon said American selling price are shown by such investigation of the Tariff Commission to be necessary to equalize such differences in costs of production;

Now, therefore, I, Franklin D. Roosevelt, President of the United States of America, do hereby approve and proclaim a decrease in the rate of duty expressly fixed in paragraph 721 (b) of title I of said act on razor clams (Siliqua patula), packed in air-tight containers, from 35 per centum ad valorem to 23 per centum ad valorem; and assessment of the rate of 35 per centum ad valorem expressly fixed in said paragraph, title, and act on clams other than razor clams, and clams in combination with other substances (except clam chowder), packed in air-tight containers, upon the American selling price, as defined in section 402 (g) of said act, of clams other than razor clams, and clams in combination with other substances (except clam chowder), packed in air-tight containers, manufactured or produced in the United States.

In witness whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the City of Washington this 1st day of May, in the year of our Lord nineteen hundred and thirty-four, and of the Independence of the United States of America the one hundred and fifty-eighth.

[SEAL] FRANKLIN D. ROOSEVELT.

By the President:

CORDELL HULL,
Secretary of State.

[No. 2081]

51 In United States Customs Court

Reappraisement 113195–A

No. 4034

GEO. S. BUSH & CO., INC.

v.

UNITED STATES

Decision

March 11, 1937

SULLIVAN, Judge:

The merchandise in the case at bar consists of Japanese canned clams. There were two sizes, viz, 5-ounce and 8-ounce tins, each size in cases containing 48 tins. They were entered to meet advances at $4.40 per case for the 5-ounce size, and $6.40 per case for the 8-ounce tins (United States currency), less 1½ per centum. They were appraised as entered. The appraisal was made in accordance with the Presidential proclamation of May 1, 1934, T. D. 47031, which among other things changed the basis for the assessment of duty on clams other than razor clams, and clams in combination with other substances (except clam chowder), packed in airtight containers, to the American selling price as defined in Section 402 (g) of the Tariff Act of 1930 of similar merchandise manufactured or produced in the United States.

The plaintiff contends that the proper dutiable value is the export value in the country of production (Japan), and therefore it was illegal to appraise such merchandise on the basis of the American selling price. The plaintiff concedes that the clams covered by this appeal are the type provided for in the proclamation, but contends that the proclamation is illegal and void, and therefore that the clams are dutiable at their export value.

The evidence consists of the report of the Tariff Commission (Exhibit 1), and the official samples of the merchandise (Exhibits 2 and 3).

At the trial it was conceded by the Government that if the court found the merchandise dutiable according to its
52 export value, then the export value would be that shown on the invoice, viz, $2.75 and $3.68 per case, less non-dutiable charges, or a net dutiable value of $2.5107 per case and $3.3598 per case for the 5- and 8-ounce tins respectively.

It was agreed by both parties that there is no foreign value.

It was also agreed by both sides that the appraised values are the proper American selling prices and values if the court finds the dutiable value to be the American selling price.

The single question then involved is the legality of the proclamation of the President, whereby the President proclaims assessment at the rate of 35 per centum ad valorem under paragraph 721 (b), Tariff Act of 1930,

"on clams other than razor clams, and clams in combination with other substances (except clam chowder), packed in airtight containers, upon the American selling price, as defined in section 402 (g) of said Act, of clams other than razor clams, and clams in combination with other substances (except clam chowder), packed in airtight containers, manufactured or produced in the United States."

As heretofore stated, the plaintiff contends that the proclamation is void and the merchandise is dutiable according to the export value on the figures heretofore stated.

The case has been ably briefed, and plaintiff's counsel has given extended reasons to support his contention that the proclamation is void, and the export value should govern.

The admission in evidence of the report of the Tariff Commission (Exhibit 1) was not for the purpose of disputing the facts as to the value of the merchandise, but to determine whether the Commission complied with the law in giving notice and in its investigation. If it did, then on the facts in this record the Presidential proclamation is valid. On the other hand, if it did not, the Presidential proclamation is invalid.

The record presents the following questions:

(1) Had the President jurisdiction to act?

(2) Was a hearing had by the Tariff Commission as provided in section 336 of the Tariff Act of 1930?

53 (3) Was a report made to the President with recommendations?

(4) Did the President act on such report?

Section 336 has reference entirely to "Equalization of Costs of Production," and "Change of Classification or Duties." In specific terms it provides:

"In order to put into force and effect the policy of Congress by this Act intended, the commission (1) upon request of the President, or (2) upon resolution of either or both Houses of Congress, or (3) upon its own motion, or (4) when in the judgment of the Commission there is good and sufficient reason therefor, upon application of any interested party, shall investigate the differences in the costs of production of any domestic article and of any like or similar foreign article. In the course of the

investigation the commission shall hold hearings and give reasonable public notice thereof, and shall afford reasonable opportunity for parties interested to be present, to produce evidence, and to be heard at such hearings."

Thus was established "the policy of Congress by this Act intended" to do certain things on the happening of certain events.

The statute further provides:

"If the commission finds it shown by the investigation that the duties expressly fixed by statute do not equalize the differences in the costs of production of the domestic article and the like or similar foreign article when produced in the principal competing country, the commission shall specify in its report such increases or decreases in rates of duty expressly fixed by statute (*including any necessary change in classification*) as it finds shown by the investigation to be necessary to equalize such differences. [Italics ours.]

It then further provides:

"(b) CHANGE TO AMERICAN SELLING PRICE.—If the commission finds upon any such investigation that such differences cannot be equalized by proceeding as hereinbefore provided, it
54 shall so state in its report to the President and shall specify therein such ad valorem rates of duty based upon the American selling price (as defined in section 402 (g)) of the domestic article, as it finds shown by the investigation to be necessary to equalize such differences. In no case shall the total decrease of such rates of duty exceed 50 per centum of the rates expressly fixed by statute, and no such rate shall be increased."

Here is a specific declaration by Congress, which has plenary power with reference to all customs rates of duty.

What are the jurisdictional facts required to set in motion the action of the President? (1) That an investigation be had by the Tariff Commission.

The report to the President (Exhibit 4) expressly states with reference to the class of merchandise involved, and it is admitted the proclamation and report of the Commission are directed towards merchandise identical with that involved. In this report the Commission states:

"The Commission instituted this investigation on June 28, 1932, in response to an application for an increase in the duty on all canned clams and an application for a decrease in the duty on minced razor clams."

This was the inception of its proceedings.

Then the report states:

"Public notice of the hearing was given on the same date. At the public hearing, held on October 5, 1932, in Washington, D. C.,

parties interested were given reasonable opportunity to be present, to produce evidence, and to be heard, as required by law."

Thus it amply appears that the Commission complied with the statute by giving notice and holding the investigation.

With the filing of the application and giving due notice of the hearing the Tariff Commission had jurisdiction to hold the hearing and make the report to the President. With that fact established the report made to the President complied with every jurisdictional requirement necessary to put in motion its investigation.

The Commission found it shown by the investigation—

"(a) That the duty of 35 per cent ad valorem, expressly fixed by statute on clams, clam juice, or either in combination with other substances, packed in airtight containers, does not in the case of clams or of clams in combination with other substances (except clam chowder), packed in airtight containers, equalize the difference in the costs of production, including transportation and other delivery charges to the principal market in the United States, of the domestic articles and the like or similar foreign articles produced in the principal competing countries."

The Commission concludes with reference to the merchandise involved, viz, clams packed in airtight containers, etc., that—

"* * *, the rate of duty necessary to equalize such difference within the limits permitted by section 336 (b) of title III of the Tariff Act of 1930 is 35 percent ad valorem based upon the American selling price of the domestic article."

This was the report of the Commission to the President and its recommendations.

So far, in my judgment, the report is competent evidence to establish these jurisdictional facts. But it would not be competent, in my judgment, for this court to attempt to weigh the facts upon which the Commission's judgment was based. This court is not permitted to do so. Such facts are not justiciable. All that is required is to ascertain whether or not the Commission complied with the law in its proceedings. I find it has. Therefore, this report to the President was competent, and within the law as set out in section 336.

It is now contended, and forcibly, that the facts were not sufficient to justify the President in acting, and therefore the proclamation is void. That strikes at the very heart of this entire matter. It is not for this court to weigh what facts the Commission found. It was for the President to weigh such facts for the statute clearly provides:

"SECTION 336. * * * (c) PROCLAMATION BY THE PRESIDENT.—The President shall by proclamation approve the rates of duty and changes in classification and in basis of value specified in any report of the commission under this section, if *in his judgment* such rates of duty and changes are shown by such investigation of the commission to be necessary to equalize such differences in costs of production." [Italics ours.]

Therefore, it follows that the weight to be given to the facts disclosed rests with the President, that he may either reject or accept such facts and the recommendations made by the Commission. He cannot, in my judgment, as was held under Section 315 of the Tariff Act of 1922, consider matters outside of the Commission's report. He is confined to the facts narrated in the report submitted to him.

If these facts are not susceptible of the finding made by the President this court cannot interfere therewith, nor say to the President, "You should not have accepted them." The law does not give this court that power. It expressly puts it within the power of the President to say whether or not the changes as shown by such investigation are necessary to equalize the cost of production. When he makes his finding it becomes a verity, not subject to any judicial review thereof.

Counsel for plaintiff in their brief do not severely antagonize this holding, but contend that the Commission committed error in arriving at the valuation it did by taking "the weighted average of the invoice prices or values," and not giving full consideration to differences in exchange values. In my judgment, these are matters that cannot be considered by this court. I must be governed entirely when the jurisdictional facts are established, by the proclamation itself, and that proclamation enumerates the conditions the Tariff Commission is required to follow before the report is made. The President finds the Commission did make an investigation; that public notice was given of a hearing at which the parties interested were given an opportunity to be present and to be heard; and the proclamation of the President, as a result of that investigation with respect to such differences in the cost of production, and referring to the merchandise involved, namely, clams packed in airtight containers, finds that the principal competing country is Japan, "and that said differences with respect to these articles cannot be equalized by proceeding under subdivision (a) of said section and act," and he concludes:

"Whereas in the judgment of the President such decreased rate of duty and such ad valorem rate of duty based upon

said American selling price are shown by such investigation of the Tariff Commission to be necessary to equalize such differences in costs of production:

"Now, therefore, I, Franklin D. Roosevelt, President of the United States of America, do hereby approve and proclaim * * * assessment of the rate of 35 per centum ad valorem expressly fixed in said paragraph, title, and act on clams other than razor clams, and clams in combination with other substances (except clam chowder), packed in air-tight containers, upon the American selling price, as defined in section 402 (g) of said act, of clams other than razor clams; and clams in combination with other substances (except clam chowder), packed in air-tight containers, manufactured or produced in the United States."

The attack made by counsel for the plaintiff on the report of the Tariff Commission seems to be that the Commission did not follow the law in that they accepted "the weighted average" and did not sufficiently find with reference to the values of exchange; that the Commission is required to follow an "intelligible principle" as enunciated in Hampton v. United States, 276 U. S. 394. This is not an attack on the constitutionality of the law. The "intelligible principle" referred to in the Hampton case, supra, is an enunciation by the court that if there is an "intelligible principle" enacted into law by Congress, the President then may act as the agent of Congress in carrying out its wishes.

It has been consistently held that Congress may delegate to an agent the ascertainment of facts, and that the agent may then carry out the policy of Congress (Field v. Clark, 143 U. S. 649). The latest expression I have been able to find on this point is Panama Refining Co. v. Ryan, 293 U. S. 388, where Chief Justice Hughes states:

"Accordingly we look to the statute to see whether the Congress has declared a policy with respect to that subject; whether the Congress has set up a standard for the President's action; whether the Congress has required any finding by the President in the exercise of the authority to enact the prohibition."

Admittedly a policy as defined in section 336. Therefore Congress did declare a policy. It did set up a standard for the President's action. It did require that facts be reported to the President in the exercise of the authority therein expressed. The court then said:

"Applying that principle, authorizations given by Congress to selected instrumentalities for the purpose of ascertaining the existence of facts to which legislation is directed have constantly been sustained. Moreover, the Congress may not only give such authorizations to determine specific facts but may establish pri-

mary standards, devolving upon others the duty to carry out the declared legislative policy; that is, as Chief Justice Marshall expressed it, 'to fill up the details' under the general provisions made by the legislature."

In Hampton v. United States, 276 U. S. 394, the court said (p. 409):

"The same principle that permits Congress to exercise its rate making power in interstate commerce, by declaring the rule which shall prevail in the legislative fixing of rates, and enables it to remit to a rate-making body created in accordance with its provisions the fixing of such rates, justifies a similar provision for the fixing of customs duties on imported merchandise. If Congress shall lay down by legislative act an *intelligible principle* to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power. If it is thought wise to vary the customs duties according to changing conditions of production at home and abroad, it may authorize the Chief Executive to carry out this purpose, with the advisory assistance of a Tariff Commission appointed under Congressional authority." [Italics ours.]

In my judgment this is ample to justify the issuance of the proclamation in the case at bar.

In Akawo v. United States, 23 C. C. P. A. 75, T. D. 47437, the court had under consideration section 315 of the Tariff Act of 1922. That provision was somewhat broader than section 336 of the act of 1930. It required the report of the Tariff Commission, but the President was not confined to its facts, as he is under Section 336 of the act of 1930. In the Akawo case, supra, the question was similar to that involved in the present case,
59 and passed upon the American selling price as defined in Section 402 (f) of the act of 1922. In fact the very question now before us was involved in the Akawo case; that is, that the valuation upon the basis of the American selling price was illegal and void.

The court found in the Akawo case, supra, that the Tariff Commission, as a condition precedent to a lawful proclamation by the President, had held an investigation; that public notice of such investigation was given and that interested parties appeared at the hearings and presented briefs relative to the subject-matter of the investigation, as appeared from the report. In the case at bar it is not contended that notice was not given, nor that investigations were not held. The presumption arising from the investigation is that notice was given. The report is competent evidence with reference to that fact.

In the Akawo case, supra, the court in closing its opinion stated:

"It appears from the record that the President complied with the mandates of section 315, supra. Accordingly his findings of fact are final and conclusive, and may not be reviewed by the courts." United States v. S. Leon & Co., 20 C. C. P. A. (Customs) 49, T. D. 45677, and cases cited therein.

Without answering every question presented by plaintiff's counsel in their brief, we can state that the same facts are estab- in the case at bar, and I find:

(1) That there was a petition filed with the Tariff Commission with reference to an increase in rates.

(2) That in accordance therewith an investigation was ordered.

(3) That public notice was given, and interested parties appeared in response thereto, and offered testimony.

(4) That a report thereon was made to the President of the United States, showing there was a difference in the cost of production of domestic articles and similar foreign articles produced in Japan, and that to equalize such costs it was necessary to base the duty upon the American selling price of the domestic article, as defined in Section 402 (g) of the Tariff Act of 1930.

60 (5) That the proclamation of the President was legal, and that the ascertainment of the value of the merchandise in question according to the American selling price, as defined in said Section 402 (g), was legal.

Judgment will therefore be rendered for the defendant afirming the appraised value.

SULLIVAN, J.

In United States Customs Court

Seattle, Wash.

Reappraisement No. 113195–A. Collector's No. 2553. Entry No. 4670

GEO. S. BUSH & CO., INC., PLAINTIFF

vs.

UNITED STATES, DEFENDANT

Judgment

This Case having come on for trial before Judge Sullivan sitting in reappraisement, and the case having been heard and

submitted for decision, and the Court, after due deliberation, having rendered a decision herein in favor of the defendant and against the plaintiff, now in conformity with said decision,

It is Hereby Ordered, Adjudged, and Decreed that the dutiable values of the involved merchandise, on the date of exportation thereof, are the appraised values.

JERRY B. SULLIVAN,
Judge, U. S. Customs Court.

Dated at New York, N. Y., this the 11th day of March, 1937.

61 In United States Customs Court

Reap. 113195-A/2553

[Title omitted.]

Application for review

Filed May 18, 1937

Application is hereby made for a review of the decision and judgment rendered by Judge Sullivan, March 11, 1937, in Seattle reappraisement 113195-A/2553, entry number 4670, of April 6, 1936, relating to canned clams appraised at the American selling price under section 402 (g), tariff act of 1930.

San Francisco, March 29, 1937.

GEO. S. BUSH & CO., INC.,
Appellant,
By LAWRENCE & TUTTLE,
Attorneys for Appellant,
G. R. T.,
500 Sansome Street,
San Francisco, California.

To Collector of Customs, Seattle, Washington, —— ——, Assistant Attorney General, 201 Varick Street, New York City.

[File endorsement omitted.]

United States Customs. Received Mar. 31, 1937, Seattle, Wash.

62 [Clerk's certificate to record omitted in printing.]

63 In United States Customs Court

Second Division, Appellate Term

Reappraisement 113195-A. No. 4253

GEO. S. BUSH & CO., INC.

v.

UNITED STATES

Application for Review of Decision of Sullivan, Judge (Reap. Dec. 4034)

Decision

March 9, 1938

DALLINGER, Judge:

This is an application for a review of the decision (Reap. Dec. 4034) rendered by Judge Sullivan on March 11, 1937, wherein he found the dutiable value of certain clams in tins imported from Japan and entered at the port of Seattle to be the value found by the appraiser.

The merchandise was entered under duress at $4.40 per case for the 5-ounce size and $6.40 per case for the 8-ounce size (United States currency), less 1½ per centum, and it was appraised as entered. The appraisement was made in accordance with the Presidential proclamation, dated May 1, 1934, and promulgated in T. D. 47031, which changed the basis of appraisement of clams other than razor clams, and clams in combination with other substances (except clam chowder), packed in airtight containers, from the export value thereof to the American selling price of similar merchandise produced in the United States, as such selling price is defined in Section 402 (g) of the Tariff Act of 1930.

Before the trial judge the plaintiff contended that the proper dutiable value of said merchandise was the export value thereof in Japan, the country of exportation, and that it was therefore illegal to appraise it on the basis of the American selling price. The plaintiff concedes that the involved clams are of the kind

64 covered by said Presidential proclamation, but insists that such proclamation is null and void, and that consequently these clams are dutiable based upon their export value.

Before the trial court the only evidence introduced consisted of the report, dated April 5, 1934, made to the President by the United States Tariff Commission, which report is No. 84, second series, and a copy thereof is in evidence herein as Exhibit 1.

Also in evidence as Exhibits 2 and 3 are official samples of the imported merchandise.

At such hearing it was conceded by the Government that if the court found the merchandise to be dutiable on the basis of the export value thereof, such value would be that shown on the invoice, namely: $2.75 and $3.68 per case, respectively, less nondutiable charges, or a net dutiable value of $2.5107 and $3.3598 per case for the 5- and 8-ounce tins, respectively. It was agreed by both parties that there was no foreign value for said merchandise.

It was also agreed by both sides that the appraised values are the correct American selling prices, in case the court found such prices to be the dutiable value of the merchandise.

The only issue before the trial judge and before us is the legality of the Presidential proclamation of May 1, 1934 (T. D. 47031).

Section 336 of the Tariff Act of 1930 provides as follows:

"SEC. 336. EQUALIZATION OF COSTS OF PRODUCTION.

"(a) CHANGE OF CLASSIFICATION OR DUTIES.—In order to put into force and effect the policy of Congress by this Act intended, the commission (1) upon request of the President, or (2) upon resolution of either or both Houses of Congress, or (3) upon its own motion, or (4) when in the judgment of the commission there is good and sufficient reason therefor, upon application of any interested party, shall investigate the differences in the costs of production of any domestic article and of any like or similar foreign article. In the course of the investigation the commission shall hold hearings and give reasonable public notice thereof, and shall afford reasonable opportunity for parties interested to be present, to produce evidence, and to be heard at such hearings. The commission is authorized to adopt such reasonable procedure and rules and regulations as it deems necessary to execute its functions under this section. The commission
65 shall report to the President the results of the investigation and its findings with respect to such differences in costs of production. If the commission finds it shown by the investigation that the duties expressly fixed by statute do not equalize the differences in the costs of production of the domestic article and the like or similar foreign article when produced in the principal competing country, the commission shall specify in its report such increases or decreases in rates of duty expressly fixed by statute (including any necessary change in classification) as it finds shown by the investigation to be necessary to equalize such differences. In no case shall the total increase or decrease

of such rates of duty exceed 50 per centum of the rates expressly fixed by statute.

"(b) CHANGE TO AMERICAN SELLING PRICE.—If the commission finds upon any such investigation that such differences cannot be equalized by proceeding as hereinbefore provided, it shall so state in its report to the President and shall specify therein such ad valorem rates of duty based upon the American selling price (as defined in section 402 (g) of the domestic article, as it finds shown by the investigation to be necessary to equalize such differences. In no case shall the total decrease of such rates of duty exceed 50 per centum of the rates expressly fixed by statute, and no such rates shall be increased.

"(c) PROCLAMATION BY THE PRESIDENT.—The President shall by proclamation approve the rates of duty and changes in classification and in basis of value specified in any report of the commission under this section, if in his judgment such rates of duty and changes are shown by such investigation of the commission to be necessary to equalize such differences in costs of production.

* * * * * * *

"(e) ASCERTAINMENT OF DIFFERENCES IN COSTS OF PRODUCTION.—In ascertaining under this section the differences in costs of production, the commission shall take into consideration, insofar as it finds it practicable:

* * * * * * *

66 "(2) IN THE CASE OF A FOREIGN ARTICLE.—(A) The cost of production, as hereinafter in this section defined, or, *if the commission finds that such cost is not readily ascertainable, the commission may accept as evidence thereof, or as supplemental hereto, the weighted average of the invoice prices or values for a representative period and/or the average wholesale selling price for a representative period.*". [Italics ours.]

Upon this record the trial judge made the following findings:

1. That there was a petition filed with the Tariff Commission with reference to an increase in rates.

2. That in accordance therewith an investigation was ordered.

3. That public notice was given, and interested parties appeared in response thereto, and offered testimony.

4. That a report thereon was made to the President of the United States, showing there was a difference in the cost of production of domestic articles and similar foreign articles produced in Japan, and that to equalize such costs it was necessary to base the duty upon the American selling price of the domestic articles, as defined in Section 402 (g) of the Tariff Act of 1930.

5. That the proclamation of the President was legal, and that the ascertainment of the value of the merchandise in question

according to the American selling price, as defined in Section 402 (g), was legal.

At the hearing on the application for review held before this division on November 3, 1937, counsel for the appellant in his argument thus limited the issue involved herein:

Mr. TUTTLE:

* * * * * * * * *

* * * The Tariff Commission, after certain steps that had to be taken, investigated the differences in the costs of production of clams produced in the United States and clams produced in other countries. Their report is here in evidence. There is only one portion of it with which we are now concerned, that is, clams from Japan.

67 As to that merchandise, the Tariff Commission took what they found to be a representative period of time. We have no quarrel with that. They took from the month of December 1930, all of 1931, and from January until the 30th of September 1932, a period of 22 months, which they state is representative of the costs of production of both the foreign and the domestic article.

The section under which they act, section 336, directs them to investigate the differences in the cost of production, and to report those differences to the President together with their recommendations as to what changes should be made, if any. The section also allows the commission, in the event they cannot ascertain the actual cost of production, to accept, as the law says, the weighted average invoice values, and it was under that portion of the law that they found a value representing the cost of production of the Japanese article.

The period of time they took, as I said, ran from December of 1930 to September 1932. The commission instead of finding the actual cost of production took all invoices covering importations at the Port of San Francisco, which they found was the principal point of importation, and the invoices, of course, were expressed in foreign currency, in yen.

The complaint arises by virtue of the fact that the commission also determined the rates of exchange for those 22 months, during which time it ranged from 49 cents down to around 28 cents or lower, and instead of converting the yen into dollars at the rate of exchange in effect at the time of each exportation they arbitrarily stated in their report that in their opinion—I will read it, if I may; it will be more accurate:

For this reason the invoice prices of the Japanese products imported in 1931, when converted to dollars at the then current rate of exchange, are not representative of the present or prob-

able future invoice values in terms of dollars. The Commission has, therefore, used, for comparison with the domestic costs, the invoice prices in yen as evidence of costs of the Japanese product during 1931 and 1932, converted to dollars at the average rate of exchange for 1932.

It is that single act that we complain of.

* * * * * * *

68 It was by virtue, and solely by virtue, of that arbitrary method of converting the foreign currency into dollars that the commission was able to arrive at the conclusion that the differences in cost of production required the merchandise to be appraised upon the American selling price.

Counsel then proceeded to argue that the Tariff Commission exceeded its powers in taking the average rate of exchange for the entire year of 1932, whereas the invoices for only nine months of that year were examined.

In appellant's brief filed herein it is contended that if the prevailing rate of exchange at the time of each shipment had been taken instead of the average rate of exchange for the year 1932, it would not have been necessary to equalize the differences in the costs of production by an increase in duty. It is also pointed out that in a similar investigation relating to canned tuna fish the Tariff Commission in its report to the President on August 10, 1933 (Report No. 71, Second Series), used the prevailing rates of exchange on the dates of exportation, as herein contended, rather than a lower average rate as in the present case.

In appellant's brief occurs the following:

In the present case the rate of exchange used was .2811, the average for the year 1932; yet the values converted at this rate were values of merchandise exported in December 1930, during all of 1931, and from January to September 30, 1932. In other words, the rate used was not even the average of the rates in effect during the time the merchandise under consideration was exported! It was purely arbitrary and speculative, and the dollar values thus obtained, which were used as a comparison with domestic costs, bore absolutely no relationship to the real foreign values. In view of this, can it be said that the President has conformed to the "intelligible principle" laid down by Congress? Certainly not; and therefore his action was ultra vires under Foster v. U. S., 20 C. C. P. A. 15, 22, T. D. 45673, in which it was held that he "was obliged to keep within the law under which he acted; otherwise his acts became ultra vires and of no effect."

If, under the definition of "weighted average" the Presi-
69 dent is entitled to use whatever rate of exchange he chooses, then, as stated in the Foster case, supra (p. 22):

"The Statute became a dead letter, and the President may, at his choice, dispense with the essential element in the intelligible principle of rate fixing.

"If this is what Congress intended when it provided that the weighted average of the invoice prices or values might be taken as evidence of the cost of production, then without doubt the statute is an unconstitutional delegation of legislative authority."

Counsel for the Government in his brief filed herein makes three contentions:

1. That the decision and judgment of the court below should be affirmed without consideration of the merits of the case because of the importer's failure to comply with the provisions of rule 38 of the rules of this court.

2. That this court has no power to review the action of the Tariff Commission in converting the weighted average invoice value of the involved merchandise by an average rate of exchange.

3. That every act of the Tariff Commission in conducting the investigation was in strict conformity with the statute.

In regard to the first contention we are of the opinion that there has been no noncompliance with rule 38 which would justify us in refusing to consider this case on its merits.

The pertinent portions of said rule read as follows:

"38. ASSIGNMENT OF ERRORS. The appellant or his attorney in proceedings for review in reappraisement cases, when relying upon errors of law made by the court below in its rulings upon the inclusion or exclusion of evidence, shall, not less than three days prior to the date on which the case is set for argument, file with the clerk of the court, and serve upon the opposing party or his attorney, a brief statement in writing setting forth in concise form any evidence admitted or excluded as to which he considers the lower court to have committed error in its rulings thereon, pointing out specifically the rulings to which he takes exception.

"If the appellant or his attorney in proceedings for review
70 in reappraisement cases relies upon errors of fact or law, other than those set forth in the paragraph next above, the application for review shall be considered as setting forth any such errors *without the filing of further assignments.*" [Italics ours.]

It being conceded that there were in this case no rulings relating to the inclusion or exclusion of evidence which were required to be set out, the second clause of said rule was the only one applicable to the instant case. The sole object of such second

clause was to obviate the necessity on the part of the appellant of setting forth in detail the errors of fact or law of which he complained, other than those mentioned in the first clause of said rule. The application for review itself, in our opinion, was amply sufficient to cover the alleged error or errors on the part of the trial judge of which the appellant complains.

But with the second and third contentions of counsel for the Government we are in accord.

The question of the power of the courts relative to Presidential proclamations and of investigations by the United States Tariff Commission upon which said proclamations are based, has repeatedly been before this court and the Court of Customs and Patent Appeals.

The only case in which a Presidential proclamation has been declared invalid on the ground that the Tariff Commission failed to comply with the requirements of the statute is that of Carl Zeiss, Inc., v. United States, 23 C. C. P. A. 7, T. D. 47654. The sole ground for the court's decision in that case was that the Tariff Commission had not complied with the provisions of Section 336 of the Tariff Act of 1930 in the giving of a reasonable public notice to all interested parties. In every other case the courts have uniformly upheld the validity of such proclamations.

In the case of Union Fork & Hoe Co. v. United States, T. D. 47478, 67 Treas. Dec. 82, the plaintiff contended that a Presidential proclamation reducing the duty on certain hay and manure forks was illegal and void for three reasons:

1. That the foreign cost of production of said merchandise was not obtained by the United States Tariff Commission from the German manufacturer who exported the articles in controversy to the United States.

71 2. That said Commission failed to obtain the weighted average of the invoice prices or values for a representative period.

3. That said commission found the cost of production of wholly different kinds of forks from those manufactured in the United States.

After therein pointing out the inapplicability of the decision in Feltex Corporation (United States impleaded) v. Dutchess Hat Works, an American manufacturer, 21 C. C. P. A. 463, T. D. 46957, we said (in Union Fork & Hoe Co. v. United States, supra):

"We must confess that we find nothing in the above quotations which would tend to sustain the contention of the plaintiff. Much more pertinent, in our opinion, is the following excerpt from said decision (p. 476):

"It will be observed that the commission is required only to report to the President 'the results of the investigation,' and 'its

findings,' and shall specify in its report such increases or decreases in rates of duty, including any changes in classification, as it finds shown by the investigation to be necessary to equalize differences in costs of production. *It is not required to include in its report the evidence taken, nor is it required to include in its report any statement of the evidence or facts before the commission, secured in its investigation.* [Italics ours.]

"Nor do we consider as here pertinent the decision of the appellate court in William A. Foster & Co., Inc., et al. v. United States, 20 C. C. P. A. 15, T. D. 45673, from which counsel for the plaintiff quote as follows:

"Nor does what we have said amount to a holding that any sort of an investigation by the Tariff Commission, however irrelevant, will justify a following proclamation by the President under this section. An investigation of cotton goods, for example, would not be a sufficient prerequisite for a change in duties in the woolen schedule. The investigation must be upon the subject matter involved.

"In the instant case the subject under investigation by
72 the Commission was hay and manure fork heads which admittedly constitute the class of articles here imported.

"The first alleged illegality of the Commission is that the foreign cost of production was not obtained from the German manufacturer and exporter of the merchandise at bar. The fact is referred to in the report of the Commission, and the reason given for not obtaining the information from that source is that such costs could not be secured owing to the incomplete state of the records of said manufacturer.

"We can find nothing in the law which limits the Tariff Commission to that source of inquiry.

"As to the second charge of illegality, to wit, that the Commission failed to comply with the requirements of said section 336 (e), counsel for the plaintiff seem to have ignored the opening sentence of that particular part of the law. Such initial sentence reads:

"'(e) ASCERTAINMENT OF DIFFERENCES IN COST OF PRODUCTION.—In ascertaining under this section the differences in costs of production, the commission shall take into consideration, *insofar as it finds practicable:* * * *' [Italics ours.]

"We are convinced that it is not within the province of this court to inquire into the reasons which the Commission may regard as rendering the ascertainment and consideration of certain information impracticable.

"The third alleged illegality charged is that the Commission found the cost of production of wholly different kinds of fork

heads than those made in this country. But the Commission, in its report, states that it had obtained costs from a firm in Germany 'producing all types of forks.' It is not within the province of this court to review the evidence upon which the Tariff Commission may have based its conclusion of similarity of merchandise."

In the instant case the Tariff Commission said (p. 4 of Exhibit 1):

"6. The years 1931 and 1932 are representative with respect to the domestic cost of production of canned clams and the
73 invoice prices of Japanese canned clams, in terms of Japanese currency. During most of 1931 the exchange rate of the Japanese yen for the dollar was not much below par, whereas since that time it has been much below par. For this reason the invoice prices of the Japanese product imported in 1931, when converted to dollars at the then current rate of exchange, are not representative of the present or probable future invoice values in terms of dollars. The Commission has, therefore, used, for comparison with the domestic costs, the invoice prices in yen as evidence of costs of the Japanese product during 1931 and 1932, converted to dollars at the average rate of exchange for 1932. Although the exchange rate of the yen has risen since April 1933, the rate now prevailing is not much higher than the average rate for 1932."

In the present case the articles under investigation by the Tariff Commission consist of clams which admittedly are the kind of articles here imported. Moreover, it is not here within the province of this court to question the reasons advanced by the Tariff Commission for converting the invoiced prices in yen to dollars at the average rate of exchange for the year 1932. There certainly is nothing in the statute which prohibits such a method of conversion, and accordingly that matter is left to the discretion of the commission.

Finally, it is not within the province of this court to review the facts upon which the commission based its recommendation to the President for increase in rate of duty necessary to equalize the difference in the cost of production of Japanese clams as compared with similar domestic merchandise.

In affirming our decision in the case of Union Fork & Hoe Co. v. United States, supra, the appellate court in Union Fork & Hoe Co. v. United States (International Hoe & Fork Co., party in interest), 24 C. C. P. A. 199, T. D. 48656, said:

"An investigation is a prerequisite to the issuance of a proclamation by the President. William A. Foster & Co. v. United States, 20 C. C. P. A. (Customs) 15, T. D. 45673. However, when it is once established that such an investigation has been

had, it is not within the power of this court to go behind
74 the report and findings of the commission and to determine whether, in fact, the proceedings of the commission, and the evidence heard before it, was sufficient to justify the findings and conclusions arrived at.

"We do not sit as a court to review the record made before the Tariff Commission. 'When a judicial review was thought necessary the Congress provided for it, as in section 316 of the Tariff Act of 1922. Not having provided directly for such a review, it was certainly not the intent of the lawmakers that we should so review such hearings collaterally and indirectly.' Foster & Co., supra, citing Norwegian Nitrogen Products Co. v. United States, 20 C. C. P. A. (Customs) 27, T. D. 45674, and United States v. Fox River Butter Co., 20 C. C. P. A. (Customs) 38, T. D. 45675.

* * * * * * *

"The weight of this report was a matter for the consideration of the President. We have neither the inclination nor the right to review the same for the purpose of ascertaining whether the findings of the commission were correct. It is sufficient for us to say that it does appear affirmatively, from the report of said commission and its findings, that an investigation was made of the differences in cost of production of the articles of the class or type of the imported articles and like or similar domestic articles, and that a public hearing was had and an ample opportunity afforded the appellant to be present and to be heard at such hearing.

"Much reliance has been placed by counsel for appellant upon our recent case of Carl Zeiss, Inc. v. United States, 23 C. C. P. A. (Customs) 7, T. D. 47654. In that case we held a proclamation issued by the President under said section 336 to be invalid, because of a failure of the commission to give proper notice to parties interested of the subject matter of the investigation upon which the proclamation was based. Clearly, in that case, the parties interested had no notice of an inquiry which was made by the commission on its own volition, and as a result of which additional rates of duty were imposed upon certain imported products. But no such complaint is made here. The appellant
75 does not deny the receipt by it of proper notice. Its only complaint is that the investigation did not go far enough to show properly the differences of cost of production between the imported product and like or similar domestic products.

* * * * * * *

"Finally, it is contended that the commission did not obtain an 'average foreign wholesale selling price for a representative

period of like or similar competitive imported articles.' As we view it, this also raises a question as to the weight, not the legality, of the investigation of the commission. In such cases, the rule is as stated in our decision in William A. Foster & Co. (Inc.) et al. v. United States, supra, where we said:

"'It is also argued that some members of the commission computed their differences by reference to years not proper measures of such differences. These are all matters which affect the weight, not the legality, of the investigation by the commission.'"

After a careful consideration of the arguments of counsel and of the applicable decisions of the courts, we hold that the Tariff Commission in the instant case acted within its legal authority under section 336 of the Tariff Act of 1930; that its report to the President was in accordance with law; that the ascertainment of the value of the merchandise in question based upon the American selling price of similar domestic merchandise, as defined in Section 402 (g) of said tariff act, was in accordance with law, as was also the Presidential proclamation set forth in T. D. 47031.

We therefore find the proper dutiable value of the involved merchandise to be the appraised value thereof, and hold that the decision and judgment of the trial judge should be and the same hereby are affirmed. Judgment will be rendered accordingly.

FRED'K W. DALLINGER, *J.*

Concurring:
W. J. T., *J.*
D. H. K., *J.*

76 In United States Customs Court, Second Division

Seattle, Wash.

Reappraisement No. 113195–A. Collector's No. 2553. Entry No. 4670

GEO. S. BUSH & CO., INC., APPELLANT

vs.

UNITED STATES, APPELLEE

Judgment

This Case having duly come on for trial before the Second Division of the United States Customs Court, and having been heard and submitted for decision, and the Court, after due

deliberation, having rendered a decision herein, now in conformity with said decision,

It is Hereby, Ordered, Adjudged, and Decreed that the decision of the Court below be and the same is hereby affirmed.

WILLIAM J. TILSON,
D. H. KINCHELOE,
FRED'K W. DALLINGER,
Judges of the United States Customs Court.

Dated at New York, N. Y., this the 9th day of March 1938.

[File endorsement omitted.]

UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

Thursday, February 9, 1939

At a session of said court continued and held at the city of Washgton, pursuant to adjournment, on this 9th day of February, A. D. 39.

Present the Honorable FINIS J. GARRETT, Presiding Judge, and the onorables OSCAR E. BLAND, CHARLES S. HATFIELD, IRVINE L. LENOT, and JOSEPH R. JACKSON, Associate Judges.

The court was opened for business in due form.

* * * * * * *

GEORGE S. BUSH & CO., INC., APPELLANT

v.

THE UNITED STATES, APPELLEE

Customs Appeal No. 4173

Said appeal came on to be heard before the court and after hearg the arguments of counsel the cause was taken under advisement the court.

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United States Court of Customs and Patent Appeals

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GEORGE S. BUSH & CO., INC., APPELLANT

v.

THE UNITED STATES, APPELLEE

October Term, 1938. Customs Appeal No. 4173. Customs Calendar No. 30

HATFIELD, Judge. This is an appeal from a judgment of the ited States Customs Court, Second Division, in reappraisement . 113,195–A.

Merchandise, consisting of canned clams, imported into the United ates from Japan and entered at the port of Seattle, Washington, s appraised by the local appraiser at that port upon the basis of American selling price as defined in section 402 (g) of the Tariff t of 1930, pursuant to a proclamation by the President of the ited States, dated May 1, 1934, T. D. 47031, 65 Treas. Dec. 736, ued under the flexible tariff provisions—section 336—of the tariff t of 1930.

Section 336, supra, so far as material to the issues here involved, reads:

"SEC. 336. EQUALIZATION OF COSTS OF PRODUCTION.

"(a) Change of Classification or Duties.—In order to put into force and effect the policy of Congress by this Act intended, the commission (1) upon request of the President, or (2) upon resolution of either or both Houses of Congress, or (3) upon its own motion, or (4) when in the judgment of the commission there is good and sufficient reason therefor, upon application of any interested party, shall investigate the differences in the costs of production of any domestic article and of any like or similar foreign article. In the course of the investigation the commission shall hold hearings and give reasonable public notice thereof, and shall afford reasonable opportunity for parties interested to be present, to produce evidence, and to be heard at such hearings. The commission is authorized to adopt such reasonable procedure and rules and regulations as it deems necessary to execute its functions under this section. The commission shall report to the President the results of the investigation and its findings with respect to such differences in costs of production. If the commission finds it shown by the investigation that the duties expressly fixed by statute do not equalize the differences in the costs of production of the domestic article and the like or similar foreign article when produced in the principal competing country, the commission shall specify in its report such increases or decreases in rates of duty expressly fixed by statute (including any necessary change in classification) as it finds shown by the investigation to be necessary to equalize such differences. In no case shall the total increase or decrease of such rates of duty exceed 50 per centum of the rates expressly fixed by statute.

"(b) Change to American Selling Price.—If the commission finds upon any such investigation that such differences cannot be equalized by proceeding as hereinbefore provided, it shall so state in its report to the President and shall specify therein such ad valorem rates of duty based upon the American selling price (as defined in section 402 (g)) of the domestic article, as it finds shown by the investigation to be necessary to equalize such differences. In no case shall the total decrease of such rates of duty exceed 50 per centum of the rates expressly fixed by statute, and no such rate shall be increased.

"(c) Proclamation by the President.—The President shall by proclamation approve the rates of duty and changes in classification and in basis of value specified in any report of the commission under this section, if in his judgment such rates of duty and changes are shown by such investigation of the commission to be necessary to equalize such differences in costs of production.

* * * * * * * * *

"(e) Ascertainment of Differences in Costs of Production.—In ascertaining under this section the differences in costs of production,

the commission shall take into consideration, in so far as it finds it practicable:

"'(1) In the Case of a Domestic Article.—(A) The cost of production as hereinafter in this section defined; (B) transportation costs and other costs incident to delivery to the principal market or markets of the United States for the article; and (C) other relevant factors that constitute an advantage or disadvantage in competition.

"'(2) In the Case of a Foreign Article.—(A) The cost of production as hereinafter in this section defined, or, if the commission finds that such cost is not readily ascertainable, the commission may accept as evidence thereof, or as supplemental thereto, the weighted average of the invoice prices or values for a representative period and/or the average wholesale selling price for a representative period (which price shall be that at which the article is freely offered for sale to all purchasers in the principal market or markets of the principal competing country or countries in the ordinary course of trade and in the usual wholesale quantities in such market or markets); (B) transportation costs and other costs incident to delivery to the principal market or markets of the United States for the article; (C) other relevant factors that constitute an advantage or disadvantage in competition, including advantages granted to the foreign producers by a government, person, partnership, corporation, or association in a foreign country.

* * * * * * *

"(h) DEFINITIONS.—For the purpose of this section—

* * * * * * *

"'(4) The term "cost of production," when applied with respect to either a domestic article or a foreign article, includes for a period which is representative of conditions in production of the article: (A) The price or cost of materials, labor costs, and other direct charges incurred in the production of the article and in the processes or methods employed in the production; (B) the usual general expenses, including charges for depreciation or depletion which are representative of the equipment and property employed in the production of the article and charges for rent or interest which are representative of the cost of obtaining capital or instruments of production; and (C) the cost of containers and coverings of whatever nature, and other costs, charges, and expenses incident to placing the article in condition packed ready for delivery.'"

Section 402 of the Tariff Act of 1930, so far as pertinent, reads:

"SEC. 402. VALUE.

* * * * * * *

"(d) Export Value.—The export value of imported merchandise shall be the market value or the price, at the time of exportation of such merchandise to the United States, at which such or similar

merchandise is freely offered for sale to all purchasers in the principal markets of the country from which exported, in the usual wholesale quantities and in the ordinary course of trade, for exportation to the United States, plus, when not included in such price, the cost of all containers and coverings of whatever nature, and all other costs, charges, and expenses incident to placing the merchandise in condition, packed ready for shipment to the United States.

* * * * * * * * *

"(g) American Selling Price.—The American selling price of any article manufactured or produced in the United States shall be the price, including the cost of all containers and coverings of whatever nature, and all other costs, charges, and expenses incident to placing the merchandise in condition packed ready for delivery, at which such article is freely offered for sale to all purchasers in the principal market of the United States, in the ordinary course of trade, and in the usual wholesale quantities in such market, or the price that the manufacturer, producer, or owner would have received or was willing to receive for such merchandise when sold in the ordinary course of trade and in the usual wholesale quantities, at the time of exportation of the imported article."

The importer appealed for reappraisement, claiming that the involved merchandise, which it is conceded is dutiable under paragraph 721 (b) of the Tariff Act of 1930 at 35 per centum ad valorem, should have been appraised at its foreign or export values, whichever are higher, rather than upon the basis of the American selling price, as defined in section 402 (g), supra.

On the trial before the trial court it was stipulated by counsel for the parties that the merchandise has no foreign values; that its export values are $2.75 per case for that imported in five-ounce tins, and $3.68 per case for that imported in 8-ounce tins, less nondutiable charges as shown by the invoice; that should the export values be held to be the proper dutiable values of the merchandise the dutiable values are $2.5107 per case for the 5-ounce tins, and $3.598 per case for the 8-ounce tins; and that should the presidential proclamation be held valid, the appraised values are the proper dutiable values of the merchandise.

Counsel for the importer introduced in evidence the presidential proclamation and the report of the Tariff Commission.

The trial court affirmed the appraised values, and, on appeal, the appellate division of the Customs Court affirmed the judgment of the trial court.

Counsel for appellant contend that the proclamation by the President is invalid because it was based upon an investigation by the Tariff Commission which was not made in accordance with the provisions of section 336, supra; that the Tariff Commission being unable to find the cost of production of the involved merchandise, as defined in section 336 (h) (4), accepted as evidence of such cost the weighted average of invoice prices of merchandise like that here

involved in Japanese yen for the period from December 1, 1930, to September 30, 1932, and converted the Japanese yen into United States currency at the average rate of exchange for the year 1932, contrary to the provisions of section 336 (e) (2), supra; that, in so doing, the commission failed to follow the plain mandates of the statute, and, as a result, found it necessary to raise the duties on the imported merchandise out of all proportion to the difference in the cost of production of such merchandise and a like domestic product; and that "if the procedure followed by the commission and the President is not in violation of the terms of section 336, then the statute is an unconstitutional delegation of legislative power in that it grants to the agent discretion as to what the law shall be." The validity of the presidential proclamation is also challenged by counsel for appellant for other reasons, which, due to the views we hold, need not be stated here.

In its report in the instant case, the Tariff Commission stated that the cost of production of the foreign article, as defined in section 336 (h) (4), supra, was not readily ascertainable, and that, in accordance with section 336 (e) (2) (A), it "*accepted as evidence thereof the weighted average invoice prices of imports from that country.*" [Italics ours.]

It will be observed that section 336 (e) (2) (A) expressly authorizes the commission to accept as evidence of the cost of production of a foreign article "the weighted average of the invoice prices or values for a representative period," in the event the cost of production, as defined in paragraph (h) (4), supra, cannot be readily ascertained.

In its report, the commission stated that—

"*The years 1931 and 1932 are representative* with respect to the domestic cost of production of canned clams *and the invoice prices of Japanese canned clams, in terms of Japanese currency.* During most of 1931 the exchange rate of the Japanese yen for the dollar was not much below par, whereas since that time it has been much below par. For this reason the invoice prices of the Japanese product imported in 1931, when converted to dollars at the then current rate of exchange, are not representative of the present or probable future invoice values in terms of dollars. *The Commission has, therefore, used, for comparison with the domestic costs, the invoice prices in yen as evidence of costs of the Japanese product during 1931 and 1932, converted to dollars at the average rate of exchange for 1932.* Although the exchange rate of the yen has risen since April 1933, the rate now prevailing is not much higher than the average rate for 1932." [Italics ours.]

and that—

"(C) *No other relevant factors constituting an advantage or disadvantage in competition were disclosed during the course of the investigation.*" [Italics ours.]

The question presented, therefore, is whether the Tariff Commission had any statutory authority to take the period from De-

cember 1, 1930, to September 30, 1932 (which it did in the instant case), as a representative period with respect to the invoice prices or values in Japanese currency, and, because the "exchange rate of the Japanese yen for the dollar" was much below par in 1932, use the average rate of exchange during the year 1932 for the purpose of ascertaining the weighted average of invoice prices in United States currency for the period from December 1, 1930, to September 30, 1932.

In providing in section 336 (e) (2) (A) that the Tariff Commission might accept as evidence of the cost of production of a foreign article the "weighted average of the invoice prices or values for a representative period," the Congress must have had in mind the conversion of foreign currency into United States currency. It certainly knew that finding the weighted average of the invoice prices or values for a *representative period* in foreign currency would afford the Tariff Commission no information whatsoever as to the cost of production of a foreign article.

We are of opinion that the statutory provision should be construed as though it read—the commission may accept as evidence of the cost of production of a foreign article the weighted average of the invoice prices or values *in United States currency for a representative period.*

In the case of Feltex Corp. v. Dutchess Hat Works, 21 C. C. P. A. (Customs) 463, 478, T. D. 46957, this court considered the language "the weighted average of the invoice prices or values for a representative period," contained in section 336 (e) (2) (A), supra, and said, interalia:

"It is clear that Congress, in using the term 'representative period,' had in mind that conditions upon a given day or during a given month might not fairly reflect the prices at which the merchandise was imported into the United States, *but in order fairly to determine invoice prices as evidence of costs of production, they should be considered over a representative period, and their weighted average over such period might be accepted.*" [Italics supplied.]

It was also stated in that decision that—

"The statute expressly requires the commission, in certain circumstances, to select a representative period for the ascertainment of certain facts. This the commission declares it has done. Moreover, there is no evidence in the record that it was not in fact a representative period for the ascertainment of the weighted average of invoice prices as required by the statute."

What the commission did in the instant case was to find the weighted average of the invoice prices or values in Japanese currency for an alleged representative period—December 1, 1930, to September 30, 1932—and then convert the Japanese currency into United States currency at the average rate of exchange for another period—the year 1932. Obviously, the commission did not find the weighted average of the invoice prices or values for a representative period. On the contrary, it found a weighted average by using two

eparate periods, neither of which was representative. The formula sed by the commission was not that prescribed by the Congress, t one which the commission evidently thought was better adapted the exigencies of this particular case.

If the commission has authority to modify the formula prescribed the Congress for finding the weighted average of the invoice rices or values, it has equal authority to change the statutory defiion of the term "cost of production," provided in section 336) (1), supra. Furthermore, if the commission had authority to what it did in the instant case, that is, apply the average rate exchange for the year 1932 for the conversion of Japanese curncy into United States currency, during which period the exchange te was "much below par," and thereby find that the cost of proiction of the foreign article was far less than the cost of production the domestic article, it, of course, had equal authority to apply average rate of exchange for the year 1931, during which period ch rate was "not much below par," and, as a consequence, have und a much higher cost of production for the foreign product, or e commission might have followed the formula provided by the ngress and found the weighted average of the invoice prices or lues of the foreign product in United States currency for a repreitative period by converting Japanese currency into United States rrency at the proper rates of exchange for the period from Decem- 1, 1930, to September 30, 1932, and found a cost of production of e foreign article greater than that found by the commission and s than that which the commission would have found had it applied average rate of exchange for the year 1931.

By following its own formula, the commission found it impossible equalize the difference in costs of production of the foreign and mestic articles by raising the 35 per centum ad valorem rate of ty provided in paragraph 721 (b), supra, 50 per centum, the maxim increase provided in section 336 (a), supra, and, accordingly, und it necessary to apply the 35 per centum ad valorem rate of ty "based upon the American selling price (as defined in section 2 (g)) of the domestic article," in accordance with the provisions section 336 (b), supra. Had the commission followed the second mula hereinbefore stated, the difference in cost of production of foreign article and the domestic article would have been much s, and consequently the customs duties necessary to equalize such ferences would have been much less. Or had the commission lowed the formula prescribed by the Congress, the difference in t of production of the foreign and domestic articles would have n less than that found by the commission and greater than that ich it might have found had it followed the second formula, and sequently the customs duties necessary to equalize such difference cost of production would have been less than that found by the mission in the instant case, and greater than that which the mission would have found had it followed the second formula.

It is clear, therefore, that if the commission has authority to do what it did in the instant case, it has authority to find on the same facts at least three entirely different costs of production for the foreign article, and, instead of recommending to the President a rate of duty based upon findings of fact, could recommend a rate of duty in accordance with its own economic theories. Such authority necessarily involves a discretion as to whether tariff duties shall be high or low, or whether they shall be high in certain instances and low in others—a discretion, legislative in character, which the Congress has no power to delegate. Hampton & Co. v. United States, 276 U. S. 394, and cases therein cited. Obviously, the Congress did not intend to delegate any such power to either the Tariff Commission or the President.

The Congress has given the Tariff Commission wide latitude so that the difference in cost of production of a domestic and a like or similar foreign article might be properly ascertained. In so doing, however, the Congress has prescribed certain limitations and laid down certain definitions, which the Tariff Commission has no right to ignore. Hampton & Co. v. United States, supra.

It is urged upon us, in the instant case, that, as the commission is not limited in ascertaining the cost of production of a foreign article to the weighted average of invoice prices or values but may, as it did in the instant case, take into consideration transportation costs and other costs incident to delivery of the foreign article to the principal market of the United States, as provided in section 336 (e) (2) (B), supra, and also "other relevant factors that constitute an advantage or disadvantage in competition," as provided in section 336 (e) (2) (C), supra, it had the right to take into consideration, in finding the "weighted average of the invoice prices or values for a representative period," the comparative values of the foreign and United States currencies, and apply the rate of exchange for one period to the weighted average in a foreign currency of the invoice prices or values for another period.

The answer to that contention is that the statute does not so provide.

Whether the Congress intended that the language "other relevant factors that constitute an advantage or disadvantage in competition," contained in section 336 (e) (2) (C), supra, should include matters pertaining to the conversion of foreign currency into United States currency is a question which need not concern us here. The Congress certainly did not intend that, in finding the "weighted average of the invoice prices or values" of a foreign article "for a representative period," the commission should take into consideration "other relevant factors that constitute an advantage or disadvantage in competition." It is obvious that the Congress intended that such relevant factors, if any, should be considered by the commission independently of, or supplementary to, the weighted average of invoice prices or values of a foreign article for a representative period.

A legal investigation by the Tariff Commission is a condition precedent to the issuance of a lawful proclamation by the President. Hampton & Co. v. United States, supra; William A. Foster & Co. (Inc.) et al. v. United States, 20 C. C. P. A. (Customs) 15, T. D. 45673; Norwegian Nitrogen Products Co. v. United States, 20 C. C. P. A. (Customs) 27, T. D. 45674; United States v. Fox River Butter Co., 20 C. C. P. A. (Customs) 38, T. D. 45675. That the investigation of the costs of production in accordance with the provisions of section 336 (e) (1) and (2) and (b) (4) is necessarily involved in, and, therefore, a part of, the Tariff Commission's investigation of the difference in the cost of production of a domestic article and a like or similar foreign article, is so clear as to require no discussion, for, obviously, unless the Tariff Commission first investigates the cost of production of each of the competing articles, it cannot ascertain the difference in the costs of production of such articles. The report of the Tariff Commission to the President is competent evidence to establish whether the commission's investigations and findings were made in conformity with the statutory requirements. Norwegian Nitrogen Products Co. v. United States, supra; United States v. S. Lowe & Co., 20 C. C. P. A. (Customs) 49, T. D. 45677; Carl Zeiss, Inc. v. United States, 23 C. C. P. A. (Customs) 7, T. D. 47654.

It clearly appears from the commission's report that its investigation of the cost of production of the foreign article and its findings with respect thereto were based upon an erroneous conception of the statutory provision relative to the weighted average of the invoice prices and values of the foreign article for a representative period, and that, had the commission ascertained the weighted average of such invoice prices or values in accordance with the statutory provision, its findings both with respect to the cost of production of the foreign article and the rate of duty necessary to equalize the difference in cost of production of that article and the domestic article would have been substantially different.

In the case of Feltex Corp. v. Dutchess Hat Works, supra, we held that the President was not bound by the "results" or "findings" reported by the Tariff Commission in determining whether the rates specified in the report of the commission are shown by the Tariff Commission's investigation to be necessary to equalize the difference in cost of production of foreign and domestic products, and that if "the President, upon an examination of all the facts before the commission, had any legal basis for the finding" that the rates specified in the report of the commission "were necessary to equalize the costs of production, his proclamation is valid."

In the Feltex Corp. case, supra, it appeared that the Tariff Commission had made a legal investigation, and the principles announced in our decision in that case were intended to apply only in the event such an investigation has been made. In the instant case, however, a legal investigation by the Tariff Commission—a condition precedent to the issuance of a lawful proclamation by the President—has not

been made. Accordingly, the principles announced in the Feltex case, supra, have no application to the issues in the case at bar.

We must hold, therefore, that as the investigation made by the Tariff Commission was illegal for the reasons hereinbefore stated, the proclamation by the President, based upon such investigation, was without authority of law, illegal, and void; that the appraisement and reappraisement of the involved merchandise, made on the basis of the American selling price in accordance with such proclamation, were, therefore, illegal and void; that the export values are the dutiable values of the merchandise; that, in accordance with the stipulation entered into by the parties, the dutiable values of the merchandise are $2.517 per case for that imported in 5 ounce tins, and $3.598 per case for that imported in 8 ounce tins; and that the appellate division of the United States Customs Court erred in affirming the judgment of the trial court.

Accordingly, the judgment is reversed and the cause remanded for proceedings consistent with the views herein expressed.

Reversed and remanded.

United States Court of Customs and Patent Appeals

GEORGE S. BUSH & CO., INC., APPELLANT

v.

THE UNITED STATES, APPELLEE

October Term, 1938; Customs Calendar No. 30; Customs Appeal No. 4173

LENROOT, Judge, dissenting: I am unable to concur in the conclusion reached by the majority herein.

Of course the involved proclamation of the President is presumptively valid.

The majority opinion does not hold that there were not facts before the commission upon which costs of production could be ascertained. The evidence before the commission is not before us, and the conclusion of the majority is based wholly upon the report of the commission to the President.

The majority holds that, although the commission investigated prices or values of the foreign article for a representative period, the conversion of these prices from yen into dollars at the average rate of exchange for the year 1932 for the entire representative period was erroneous, that such error rendered the investigation made by the commission illegal, and that the proclamation of the President, having been based upon an illegal investigation, was without authority of law and void.

For the purpose of this dissent I will assume that the commission erred in its conversion of Japanese yen into dollars, at the average rate of exchange for 1932, applied to invoices of 1931. I contend, however,

that this error did not render the investigation illegal, nor should it be assumed that the President made the same error in approving the rate recommended by the Tariff Commission. It is my judgment that if there was any substantial evidence before the commission to sustain the proclamation of the President, it was valid notwithstanding any error made by the commission in drawing its conclusions from the facts secured by it in its investigation. David L. Moss Co., Inc. v. United States, 26 C. C. P. A. (Customs) —, C. A. D. 45, 103 F. (2d) 395. Inasmuch as the evidence produced before the commission is not before us, we must presume that there was such substantial evidence unless from the facts reported by the commission we may not indulge the legal presumption that there was substantial evidence before the commission sustaining the action of the President. Carl Zeiss, Inc. v. United States, 23 C. C. P. A. (Customs) 7, T. D. 47654.

I find nothing in the record in the case at bar to indicate that the commission might not have come to the same conclusion as to the rates recommended if it had not erred in its application of the rate of exchange to the invoices of 1931. There is nothing in the report of the commission or in the record indicating that it did not also have before it invoice prices of imports from Japan, in terms of yen, for the years 1933 and immediately preceding the date of its report, which was April 5, 1934. If the average prices shown by such invoices were in yen approximately the same as the prices in 1931 and 1932, and if the commission had converted the yen prices on invoices of 1931 upon the rate of exchange prevailing in 1931, we think it would have been fully justified in holding that the difference in the rate of exchange prevailing in 1931 and 1932 and that prevailing in 1933 and 1934 was a relevant factor in determining the differences in costs of production at the date of its report, which, after all, was the ultimate objective of the investigation, and that, in order to recommend to the President a rate which would equalize the differences in such cost of production, the depreciation in the value of the yen, measured in U. S. dollars, should be taken into consideration. This being true, the President could have legally approved the rate recommended by the Tariff Commission. Furthermore, I call attention to the fact that the commission in its report stated that the recommended rate is less than the excess of domestic over foreign costs. The reason that no higher rate was recommended was that the statute, section 336, did not permit it. The situation, therefore, was that the President could have found upon the facts before the commission a less difference between the cost of production of domestic and foreign articles than that found by the commission, and yet have approved the rate recommended by it.

I contend that any conclusion arrived at by the commission from the facts secured in its investigation is not a part of the investigation and may lawfully be ignored by the President. Section 336 (e) provides that the President shall by proclamation approve the rates recommended by the commission "if *in his judgment* such rates of duty and

changes are shown *by such investigation of the commission* to be necessary to equalize such differences in costs of production." [Italics supplied.]

Surely it cannot be said, in view of the above-quoted language, that the conclusions of the commission are a part of the investigation in the sense that an error of law by the commission in arriving at its conclusions renders the investigation illegal.

Furthermore section 336(a) distinguishes between the "results of the investigation" and the investigation itself, clearly indicating that the findings of the commission from the facts adduced before it are not strictly a part of the investigation itself.

The predecessor of section 336 was section 315 of the Tariff Act of 1922. One of the principal differences between the two sections is that in section 315 the President, in arriving at his determination, was not confined to a consideration of the facts secured by the commission, while under section 336 he is so limited.

However, so far as the question before us is concerned, I consider certain of our decisions under the Tariff Act of 1922 applicable here.

In the case of William N. Foster & Co. (Inc.) et al. v. United States, 20 C. C. P. A. (Customs) 15, T. D. 45673, we said:

"In determining this matter, it will be borne in mind that we are here concerned with the legality of the President's act in raising the rates on case polished plate glass, unsilvered, from the statutory figure to that fixed by his proclamation. The question is not whether the United States Tariff Commission committed error, or whether the testimony heard by, or the findings of, the commission were sufficient to legally justify the President's finding and proclaimed rates. The President is not bound by such testimony or findings. He may arrive at his conclusions from information derived from other sources, which information may be privately conveyed and confidentially received. The various elements which he must take into consideration, as fixed by said section 315 (c), give him wide latitude. Therefore, it is fallacious to argue that possible error committed by the Tariff Commission, or failure of proof before that body, may invalidate the President's finding and proclamation. Such hearing before the United States Tariff Commission is provided by law 'to assist the President,' not to control him."

Except for the fact that under the Tariff Act of 1930 the President is bound by the testimony adduced before the commission, while under the act of 1922 he was not, the language last above quoted is clearly applicable to the case at bar. Here, as there, the President is not bound by the findings of the commission, and here, as there, it is fallacious to argue that error committed by the Tariff Commission in its findings may "invalidate the President's finding and proclamation."

In the case of Akawo & Co. et al. v. United States, 23 C. C. P. A. (Customs) 75, T. D. 47737, we said:

"* * * The mere fact that the Tariff Commission may have committed error, although we find no evidence of it, so long as its investi-

gation was a legal one, is not of vital consequence so far as the provisions of section 315, supra, are concerned. * * *"

The case of Feltex Corp. etc. v. Dutchess Hat Works, etc., 21 C. C. P. A. (Customs) 463, T. D. 46957, arose under the Tariff Act of 1930 and section 336 was there, as it is here, involved. In that case we said:

"By section 336 (c) the President is not in any way bound by the 'results' or 'findings' reported by the Tariff Commission. He is required to approve the rates specified by it if, in his judgment, such rates are 'shown by such investigation' to be necessary to equalize such differences in costs of production. In forming his judgment, as aforesaid, he is not limited to an examination of the report of the Commission. There is nothing in the statute which expressly or impliedly so requires. One of the principal distinctions between section 336 of the Tariff Act of 1930 and section 315 of the Tariff Act of 1922 is that under said section 315 the President could make any investigation that he saw fit, and might specify any increases or decreases in rates that in his judgment were necessary to equalize costs of production, subject to the limitation that such increases or decreases must not exceed 50 per centum of the rates specified under title I of the Tariff Act of 1922. Before he could so act, however, the Tariff Commission must have made *an* investigation of the differences in costs of production of the merchandise the subject matter of the President's proclamation.

"Under the provisions of section 336 of the Tariff Act of 1930 the President, in forming his judgment, is confined to a consideration of the facts secured by the Tariff Commission in its investigation, and is further limited to approval of the rates specified by the Commission if he finds, from such investigation, that the rates so specified are necessary to equalize costs of production.

"We can find nothing in the statute which limits the President to a consideration of the report of the Tariff Commission, but we think the fair construction of section 336 is that the President, upon a report coming to him from the Tariff Commission, may require such Commission to place before him all the facts secured by it in its investigation, and from such facts the President may determine whether the rates specified in the report of the Commission should be approved.

"If the Commission should, in a given case, report only its conclusions, it is clear that the President, if he is confined to the *report* of the Commission in arriving at his judgment, would have no facts whatever upon which to base his judgment but only conclusions of the Commission. It is our opinion that it was the intention of Congress that the President should consider all the relevant facts before the Commission in its investigation in arriving at his judgment, and that, in arriving at such judgment, he is not confined to a consideration of the report of the Commission other than that he must approve or disapprove the rates specified by the Commission in its report.

* * * * * * *

"We think it immaterial, so far as the question of the validity of said proclamation is concerned, what report the Commission may have made as to the *results* of its investigations or what findings it may have made, other than its finding that the rates specified by it were necessary to equalize the differences in costs of production of the merchandise under investigation. If the President, upon an examination of all the facts before the Commission, had any legal basis for a finding that such rates were necessary to equalize costs of production, his proclamation is valid."

In my judgment the majority opinion clearly overrules so much of our opinion in the Feltex case as is above quoted.

In the case of Carl Zeiss, Inc. v. United States, supra, which also arose under section 336 of the Tariff Act of 1930, we stated:

"The President, although not required by the provisions of section 336, supra, to accept the results or findings reported by the Tariff Commission, is required to limit his consideration of the case to the evidence presented to that body, and to approve the rates of duty and changes in basis of value specified by it,

'if in his judgment such rates, [and changes in basis of value] are shown by the investigation to be necessary to equalize such differences in costs of production.'"

Feltex Corp. v. Duchess Hat Works, 21 C. C. P. A. (Customs) 463, T. D. 46957.

Under the majority opinion every error of the Tariff Commission arising from failure by it to comply with the mandate of section 336 in making its findings renders the entire investigation illegal and the ensuing proclamation of the President, approving the rates specified, void. To illustrate how far reaching this ruling is, I call attention to other provisions of section 336 where such ruling may be applied. Under subdivision (e) (2) of said section the commission is required, in so far as it finds it practicable, in ascertaining the differences in cost of production, to consider transportation costs. If it should appear from the report of the commission that there were transportation costs and that the commission in making its findings had failed to consider them, the entire investigation would be illegal and the proclamation of the President would be void, even though the proclamation should recite that the President had, in arriving at his determination, taken into consideration such costs.

Under section 336 (h) (4) it is provided that the cost of production shall include the cost of containers of the merchandise; but under the majority opinion, if it appeared from the report of the commission that it had not considered the cost of containers, the entire investigation would be illegal, and the President's proclamation would be void, even though the proclamation should recite that the evidence before the commission established the cost of the containers and that the President had considered such cost in approving the rates recommended by the commission.

Other illustrations might be given where, under the view of the majority, an entire investigation would be rendered illegal through some error in the findings of the commission, which findings, we have repeatedly said, are not binding upon the President.

In conclusion, it is my view that if an investigation is held, with due notice and opportunity to be heard, and if there is substantial evidence produced before the commission to sustain the proclamation of the President, and the President in making his determination has complied with the mandate of the statute, such proclamation is valid, notwithstanding any errors made by the commission in its findings.

There being nothing in the record before us indicating that there was no substantial evidence before the commission sustaining the proclamation of the President, and the evidence before the commission not being before us, the presumption of the validity of the President's proclamation has not been overcome, and the judgment appealed from should be affirmed.

United States Court of Customs and Patent Appeals

GEORGE S. BUSH & CO., INC., APPELLANT

v.

THE UNITED STATES, APPELLEE

October term, 1938. Customs Appeal No. 4173. Customs Calendar No. 30

JACKSON, Judge, Dissenting: There is nothing expressly contained in section 336 of the Tariff Act of 1930 which would render it mandatory to convert foreign currency as held by the majority. While it is quite true that provision is made therein for the establishment of cost of production of a foreign article by taking the weighted average of the invoice prices for a representative period, it does not necessarily follow that in converting the said costs from foreign currency into dollars; any particular exchange rate for the same period be used, excluding, of course, arbitrary and capricious action. Moreover, the said statute states that the commission may consider "other relevant factors that constitute an advantage or disadvantage in competition." The fluctuating value of the yen during the represenative period fixed by the commission, in my opinion, is certainly a relevant factor affecting competition and was properly considered by the commission and such consideration is within its statutory authority.

The investigation for finding the difference in cost of production between a domestic and a like or similar foreign article has for its purpose the equalization of said costs, and a situation may arise in an investigation where the cost of production of the foreign article based upon the weighted average of the invoice prices "is not representative

of the present or future invoice values in terms of dollars" as was found by the commission here. This is a finding of fact. The change in rate of duty, classification or basis of value which may be found to be necessary is not for the present nor for the representative period. It is for the future protection of domestic industry.

The only express statutory authority which appellant contends supports its view is section 522 (b) of the said tariff act. It reads as follows:

"SEC. 522. CONVERSION OF CURRENCY.

* * * * * * *

"(b) Proclaimed Value Basis of Conversion.—For the purpose of the assessment and collection of duties upon merchandise imported into the United States on or after the day of the enactment of this Act wherever it is necessary to convert foreign currency into currency of the United States, such conversion, except as provided in subdivision (c), shall be made at the values proclaimed by the Secretary of the Treasury under the provisions of section 25 of such Act of August 27, 1894, as amended, for the quarter in which the merchandise was exported."

In my opinion, section 522 (b), supra, has no application to the issue presented. By its very language it applies only for the purpose of the assessment and collection of duties. The Tariff Commission possesses no right or duty in respect to the assessment and collection of duties upon imported merchandise. Its function is to investigate, make findings, and report such findings to the President. It is an exclusive agency of Congress and is limited by statute to the narrow purpose of collecting facts so that costs of production may be equalized as far as tariff duty is concerned in this country and abroad.

Had Congress intended that the Tariff Commission should be bound in converting foreign currency into American dollars, as held by the majority, I think it surely would have so stated in either of sections 336 or 522 (b), supra.

In my opinion the commission acted entirely within the scope of its statutory authority. However, if I am in error as to this, the conclusion reached by the majority, in my opinion, is correct.

United States Court of Customs and Patent Appeals

Thursday, June 15, 1939

At a session of said court continued and held at the city of Washington, pursuant to adjournment, on this 15th day of June, A. D. 1939.

Present the Honorable Finis J. Garrett, Presiding Judge, and the Honorables Oscar E. Bland, Charles S. Hatfield, Irvine L. Lenroot, and Joseph R. Jackson, Associate Judges.

The court was opened for business in due form.

GEORGE S. BUSH & CO., INC., APPELLANT

v.

THE UNITED STATES, APPELLEE

Customs Appeal No. 4173.

Said appeal having heretofore been brought on to be heard before he court and due consideration thereon having been had, it is:
Ordered that the judgment of the United States Customs Court be, nd the same is hereby, reversed, and said cause is remanded to said ourt for proceedings consistent with the views expressed in the opin-n of this court herein.

* * * * * * *

United States Court of Customs and Patent Appeals

Docket entry

July 8, 1939. Sixteen copies petition of appellee for rehearing filed.

United States Court of Customs and Patent Appeals

Monday, October 2, 1939

At a session of said court continued and held at the city of Wash-ngton, pursuant to adjournment, on this 2nd day of October, A. D., 939.
Present the Honorable Finis J. Garrett, Presiding Judge, and the Honorables Oscar E. Bland, Charles S. Hatfield, Irvine L. Lenroot, nd Joseph R. Jackson, Associate Judges.
The court was opened for business in due form.

* * * * * * *

GEORGE S. BUSH & CO., INC., APPELLANT

v.

THE UNITED STATES, APPELLEE

Customs Appeal No. 4173

Appellee having heretofore filed petition for rehearing herein, and e consideration thereon having been had, it is
Ordered that said petition be, and the same is hereby, denied.

* * * * * * *

United States Court of Customs and Patent Appeals

Docket entries

October 12, 1939. Motion of appellee to defer issuing final man-e until 3 months from October 2, 1939.

October 20, 1939. Appellant offers no objection to stay of final mandate.

October 23, 1939. Final mandate stayed for 3 months from October 2, 1939.

Certificate of clerk

United States Court of Customs and Patent Appeals

GEORGE S. BUSH & CO., INC., APPELLANT

v.

THE UNITED STATES, APPELLEE

Customs Appeal No. 4173

I, Arthur B. Shelton, Clerk of the United States Court of Customs and Patent Appeals, do hereby certify that the attached pages, numbered 1 to 109, inclusive, contain a true and complete transcript of the record and certain proceedings had in said court in the above-entitled appeal, as the same remain of record and on file in this office.

Witness my hand and the seal of this court this 27th day of November A. D. 1939.

[SEAL]

ARTHUR B. SHELTON,
Clerk.

U. S. GOVERNMENT PRINTING OFFICE: 1939

SUPREME COURT OF THE UNITED STATES

Order allowing certiorari

Filed February 5, 1940

The petition herein for a writ of certiorari to the U. S. Court of Customs and Patent Appeals is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Endorsement on cover:] File No. 44020. U. S. Court of Customs and Patent Appeals. Term No. 613. The United States of America, petitioner vs. George S. Bush & Co., Inc. Petition for a writ of certiorari and exhibit thereto. Filed December 29, 1939. Term No. 613 O. T. 1939.

U. S. GOVERNMENT PRINTING OFFICE: 1940